



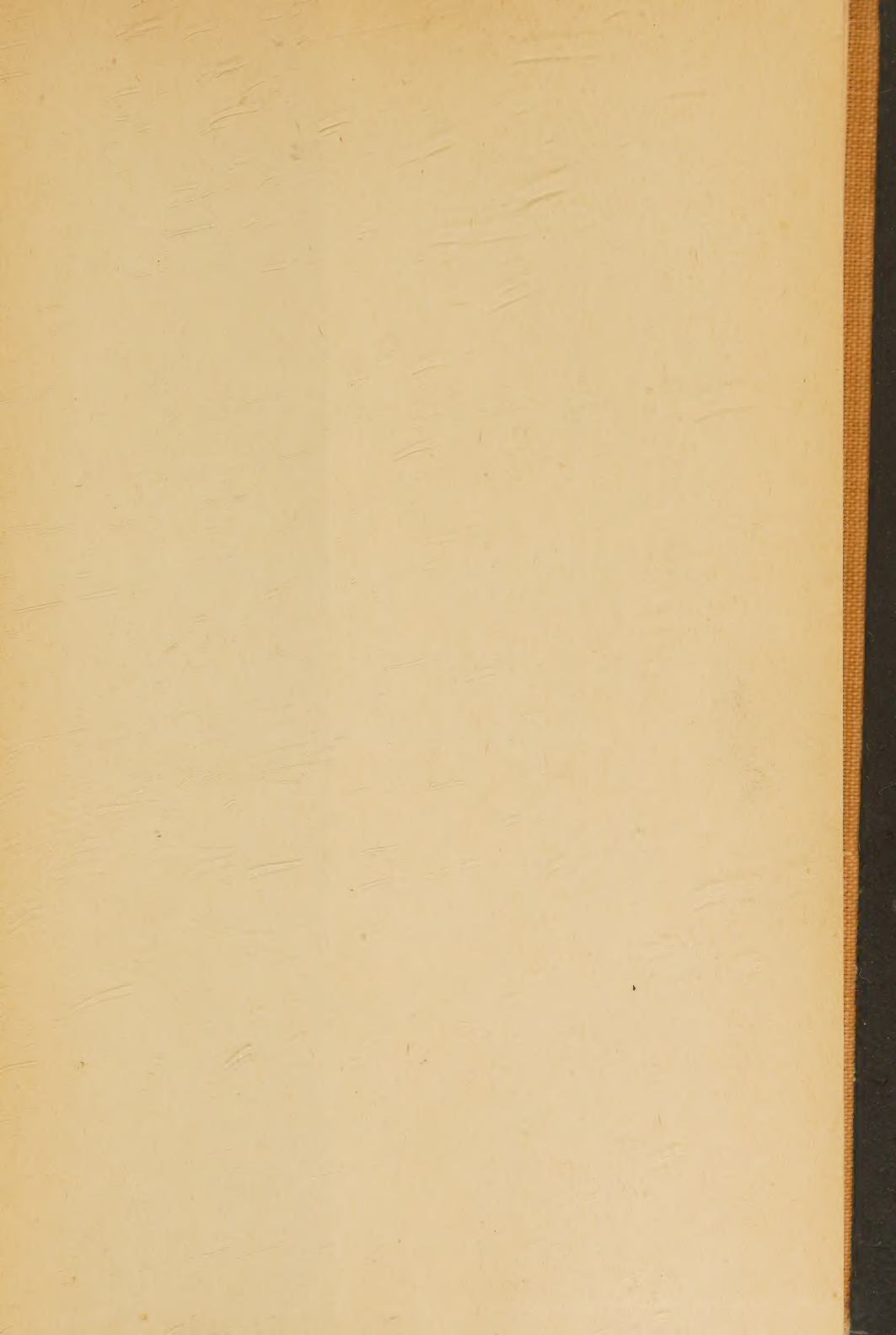
0 6797EH0 58 E5 0



Greene Co. Room 975.1 Ho
(3.00)
Delaware. Superior Court.

Reports of cases decided in
the Superior Court, and the
Ct. of Errors ... v.5

Greene County District Library





Digitized by the Internet Archive
in 2025

REPORTS
OF
CASES DECIDED
IN THE
SUPERIOR COURT,
AND THE
Court of Errors and Appeals,
OF THE
STATE OF DELAWARE.
BY
JOHN W. HOUSTON, ASSOCIATE JUDGE.
VOL. V.

MERCANTILE PRINTING COMPANY
Wilmington, Delaware
1921

TABLE OF CASES

A.	PAGE
Apel, Stewart <i>v.</i>	189
Armstrong, Hollister <i>v.</i>	46

B.	PAGE
Bailey et al., Karsner <i>v.</i>	405
Bancroft & Co. <i>v.</i> Wil. Conf. Acad- emy, ...	577
Barcroft & Co. <i>v.</i> Denny, ...	9
Barkley, McIntire <i>v.</i>	145
Beck <i>v.</i> The Bank of Smyrna, . . .	120
Bennett et al., Russell <i>v.</i>	497
Black, Walton & James <i>v.</i>	149
Boyce <i>v.</i> Cannon et al.	409
Brady & Co. <i>v.</i> Jefferson & Son, . .	60
Broomall <i>v.</i> Reybold, ...	435
Bush <i>v.</i> Bush et al., ...	245

C.	PAGE
Cannon et al., Boyce <i>v.</i>	409
City of Wilmington, Quinby & Co. <i>v.</i>	26
City of Wilmington, Homewood <i>v.</i>	123
City of Wilmington, Magarity <i>v.</i>	530
Clawson, Green <i>v.</i>	159
Clayton Lodge, Magee's Admr. <i>v.</i>	453
Clements <i>v.</i> Williamson, late sheriff, ...	25
Cloud <i>v.</i> Lore, ...	163
Cloud's Admr. <i>v.</i> Temple's Admrs., ...	587
Cooch & Co. <i>v.</i> Money, ...	177
Cooch's Ex. <i>v.</i> Cooch's Admr. et al., ...	540

D.	PAGE
Daniel, Nailor <i>v.</i>	455
Darrah, Poor <i>v.</i>	394
Davis, J. & B. R. R. Co. <i>v.</i>	90
Davis, Watertown S. E. Co. <i>v.</i>	192
Dayett, Tweed <i>v.</i>	526
Dehan, Grier <i>v.</i>	401
Denny, Barcroft & Co. <i>v.</i>	9
Deringer's Admr. <i>v.</i> Deringer's Admr., ...	148
Deringer's Admr. <i>v.</i> Deringer's Admr., ...	416
Deringer's Admr. <i>v.</i> Deringer's Admr., ...	520
Deringer's Admr. <i>v.</i> Deringer's Admr., ...	528
Doe d. Barret et al. <i>v.</i> Jefferson,	477
Doe d. Cannon <i>v.</i> Killen, ...	14
Dougherty, Hall <i>v.</i>	435

E.	PAGE
Evans, Parks <i>v.</i>	576
<i>Ex parte</i> Day, trustee of M. J. Allee, ...	510

F.	PAGE
Ferris & Co., Mitchell, Vance & Co. <i>v.</i>	34
Fidelity I., T. & S. D. Co. <i>v.</i> Niven, ...	163
Fisher, Wilson <i>v.</i>	395
Fleming, Shaw <i>v.</i>	155
Ford, Hargadine, sheriff, <i>v.</i> . . .	380
Ford and Anderson, Green's Admr. <i>v.</i>	575

G.		L.	
	PAGE		PAGE
Given, Rhoads <i>v.</i>	183	Layton and wife <i>v.</i> Houston,	574
Gray <i>v.</i> Vandyke,	134	Levy, Hansell & Sons <i>v.</i>	407
Green <i>v.</i> Clawson,	159	Loose, Hayes <i>v.</i>	596
Green's Admr. <i>v.</i> Ford and Anderson,	575	Lore, Cloud <i>v.</i>	163
Greenwood, Wilson <i>v.</i>	519	Luff <i>v.</i> Thomas,	399
Grier <i>v.</i> Dehan,	401		
Grubb, Roberts <i>v.</i>	461		
		M.	
H.		Magarity <i>v.</i> City of Wilmington	530
Hall <i>v.</i> Dougherty,	435	Magee's Adm. <i>v.</i> Clayton Lodge,	453
Hansell & Son <i>v.</i> Levy,	407	McCafferty <i>v.</i> Heritage,	220
Hargadine, sheriff, <i>v.</i> Ford.	380	McCaulley <i>v.</i> Jenney,	32
Hayes <i>v.</i> Loose,	596	McCoy <i>v.</i> P. W. & B. R. R. Co.,	599
Heritage, McCafferty <i>v.</i>	220	McIntire <i>v.</i> Barkley,	145
Herring, Thornton, Conrow & Co. <i>v.</i>	154	Miller <i>v.</i> Holding,	494
Hoffecker & Bro. <i>v.</i> N. C. C. M. I. Co.,	101	Mitchell, Vance & Co. <i>v.</i> Ferris & Co.,	34
Holding, Miller <i>v.</i>	494	Moleston <i>v.</i> Parker,	433
Hollis <i>v.</i> Vandergrift,	521	Money, Cooch & Co. <i>v.</i>	177
Hollis <i>v.</i> Vandergrift,	597	Moore's Admr., Wright <i>v.</i>	573
Hollister <i>v.</i> Armstrong,	46		
Homewood <i>v.</i> City of Wilming- ton,	123	N.	
Hossenger's Exrs., Oldham <i>v.</i>	434	Nailor <i>v.</i> Daniel,	455
Houston, Layton and wife <i>v.</i>	574	N. C. C. M. I. Co., Hoffecker & Bro. <i>v.</i>	101
		Niven, Fidelity I., T. & S. D. Co. <i>v.</i>	163
J.			
Jackson, Taylor <i>v.</i>	224	O.	
Jenney, McCaulley <i>v.</i>	32	Oldham <i>v.</i> Hossenger's Exrs.	434
Jefferson, Doe d. Barrett et al. <i>v.</i>	477		
Jefferson & Son, Brady & Co. <i>v.</i>	60	P.	
J. & B. R. R. Co. <i>v.</i> Davis,	90	Parker <i>v.</i> Moleston,	433
		Parks <i>v.</i> Evans,	576
K.		Pearce, Rowbotham <i>v.</i>	135
Karsner <i>v.</i> Bailey et al.,	405	Pennypacker et al., Rice <i>v.</i>	279
Kent County R. R. Co. <i>v.</i> Wil- son,	49	P., W. & B. R. R. Co. <i>v.</i> Kent County R. R. Co.,	127
Kent County R. R. Co., P. W. & B. R. R. Co. <i>v.</i>	127	P., W. & B. R. R. Co., McCoy <i>v.</i>	599
Killen, Doe d., Cannon <i>v.</i>	14	Pierce, Knowles <i>v.</i>	178
Knowles <i>v.</i> Pierce,	178	Poor <i>v.</i> Darrah,	394
		Q.	
		Quigley, Tomlinson & Co. <i>v.</i>	168
		Quinby & Co. <i>v.</i> City of Wil- mington,	26

TABLE OF CASES.

vii

R.		V.	
	PAGE		PAGE
Reybold, Broomall <i>v.</i>	435	Vandergrift, Hollis <i>v.</i>	521
Rhoads <i>v.</i> Given,	183	Vandergrift, Hollis <i>v.</i>	597
Rice <i>v.</i> Pennypacker et al.,	279	Vandyke, Gray <i>v.</i>	134
Roberts <i>v.</i> Grubb,	461		
Rowbotham <i>v.</i> Pearce,	135		
Russell <i>v.</i> Bennett, et al.,	497		
Russell <i>v.</i> Stoeckel,	464		
S.		W.	
Shaw <i>v.</i> Fleming,	155	Walton & James <i>v.</i> Black,	149
Shaw, Wolcott <i>v.</i>	25	Walton & James, Smith <i>v.</i>	141
Smith <i>v.</i> Walton & James,	141	Watertown S. E. Co. <i>v.</i> Davis,	192
Stewart <i>v.</i> Apel,	189	Williamson, late sheriff, Clements <i>v.</i>	25
Stoeckel, Russell <i>v.</i>	464	Wil. Conf. Academy, Bancroft & Co. <i>v.</i>	577
		Wil. Conf. Academy, Wood & Co. <i>v.</i>	513
T.		Wilson <i>v.</i> Fisher,	395
Taylor <i>v.</i> Jackson,	224	Wilson <i>v.</i> Greenwood,	519
Temple's Admr., Cloud's Admr. <i>v.</i>	587	Wilson, Kent County R. R. Co. <i>v.</i>	49
The Bank of Smyrna, Beck <i>v.</i>	120	Wolcott <i>v.</i> Shaw,	25
The Smyrna B. L. A. <i>v.</i> Worden,	508	Wood & Co. <i>v.</i> Wil. Conf. Academy,	513
Thomas, Luff <i>v.</i>	399	Worden, The Smyrna B. L. A. <i>v.</i>	508
Thornton, Conroy & Co. <i>v.</i> Her-ring,	154	Wright <i>v.</i> Moore's Admr.,	573
Tomlinson & Co. <i>v.</i> Quigley,	168		
Tweed <i>v.</i> Dayett,	526		

SUPERIOR COURT.

SPRING SESSIONS.

1875.

BARCROFT & CO. *v.* CHARLES DENNY.

A verbal acceptance of a written order for the payment of money, and promise to pay it without seeing it produced, will bind the acceptor in preference to a *fi. fa.* attachment subsequently laid in his hands for the same amount at the suit of an execution creditor.

ATTACHMENT *fi. fa.* on a judgment in this court at the suit of the plaintiffs against the defendant, and laid in the hands of Nathaniel P. Smithers, Esq., garnishee, to which he made, by consent of counsel, the following special answer in writing: That the attachment was served upon him on the 16th day of April, 1873, and that he was then indebted to Denny, the defendant in it, to the amount of seventy-five dollars, but prior to the service of it, and about one week before it, he believed, George V. Massey, Esq., called on him and informed him that he had an order drawn by Denny in his favor on him for seventy-five dollars, the amount of his indebtedness, and inquired of him if it was right, or in words to that effect; to which he replied that it was right, and then and there distinctly informed him that he would pay the sum to him instead of to Denny, and he held himself from that time as standing in the relation of payor to Massey, instead of Denny, but that the order was not shown to him until after the attachment had been served on him, nor was there any other acceptance of the order by him at any time; and upon it he presented the question to the court to

which of the two contesting parties claiming it he was legally bound to pay it under the facts and circumstances stated.

Fulton, for the plaintiffs: There was neither a proper presentment to nor a sufficient acceptance of the order by Mr. Smithers, according to the facts stated by him; for not only the order as communicated to him was verbal and by the payee of it, but his acceptance of it was also verbal merely.

In England it is essential to the acceptance of an inland or domestic bill of exchange that it shall be in writing on such bill. *Byles on Bills* 146; *Bullard v. Randall*, 1 *Gray* 605. We have never had any legislation in this State in regard to the matter, but as it originally existed at common law such a commercial instrument was a *chose* in action merely; there was, however, early legislation in England on this subject whence we have derived our law in relation to it, the first of which seems to have been in the statute of 9 & 10 Wm. 3, c. 17, in reference to inland bills of exchange, as early as 1698, which expressly prescribed and required that the acceptance of such a bill of exchange should be by underwriting the same under the party's hand accepting it, although the recognized custom and practice with regard to foreign bills of exchange was then, and has since continued to be different, but with reference to the other kind, the law in that country has remained substantially the same as it was then made; and as it was a well-known historical fact that all the laws of England were authoritatively adopted here as soon as the dominion of that country was established over what now constitutes this State, so far as they were applicable to the wants and condition of people of it, it was but reasonable to infer that such was the rule and the law in regard to the matter then recognized and established here.

Massey, contra: Did the answer as given and stated by Mr. Smithers when he was informed that I had such an order in writing, though not then about me, from Mr. Denny upon him, amount to a verbal acceptance of it? If it did, then it was not necessary that it should have been in writing even, and if so, much less that it should have been written or indorsed on the

order itself. 1 *Pars. on Notes and Bills* 285. In *Fisher v. Beckwith*, 19 *Vert.* 31, a case very similar to this, a verbal acceptance of an order in terms almost identically the same as the answer in this case was held to be sufficient.

Wales, J., delivered the opinion of the court: Nathaniel B. Smithers being indebted to Charles Denny in the sum of seventy-five dollars, the latter drew an order on him in favor of George V. Massey for that amount. Mr. Massey gave notice to Mr. Smithers that he had possession of the order and of its contents, and was informed by Mr. Smithers that "it was all right," and that he would pay him (Massey) the said sum instead of paying it to Denny; and from and after that time Mr. Smithers held himself as standing in the relation of debtor to Massey instead of to Denny. The order was not formally presented or shown to Mr. Smithers, and there was no other or different acceptance of it from that here stated. About a week after this transaction, Barcroft and others, judgment creditors of Denny, by a writ of execution with a clause of attachment, summoned Mr. Smithers to answer as the garnishee of Denny.

Upon this state of facts the court is asked to determine whether the holder of the order or the attaching creditors are entitled to the money in the hands of Mr. Smithers.

The case presents the question of the validity of a parol acceptance of a bill of exchange—the only point argued by the counsel.

At common law there was no difference between inland and foreign bills of exchange in relation to the mode of acceptance, but only as to protests, for there was no way to charge the drawer of an inland bill with interest and costs after a protest for non-payment, and the statute of 9 and 10 W. 3 was passed to remedy this. The act of 3 and 4 Anne gave a remedy by protest for non-acceptance. Prior to these statutes, it seems never to have been disputed that a parol acceptance was sufficient to bind the acceptor, and even after their passage, when the question came before Lord Hardwicke in the case of *Lumley & Palmer, Rep. t. Hardwicke* 74, it was decided that an action might be maintained against an acceptor on a parol acceptance, and that the whole provision of the acts of W. 3 and Anne

plainly relates to protests, the first giving a remedy upon protests for *non-payment*, and the second providing for protests for *non-acceptance*. The fifth section of the statute of Anne has express words that no acceptance shall charge any person unless underwritten or indorsed, but the court said that these words were restrained by the words immediately following—that if such be not thus accepted, no drawer shall be liable to pay costs, damages, or interest thereon, so that the first general words are only to be understood to relate to the charging the drawer with interest and costs. There was also a proviso that nothing in the act should discharge any remedy against the drawer, acceptor, or indorser. No change was made in the law or the ruling of the courts until 1 and 2 Geo. 4, when it was enacted that no acceptance of any *inland* bill of exchange should be valid and sufficient unless it was in writing on the bill. But this act did not include *foreign* bills, and it has been decided that although a promise to accept a bill not drawn will not be available as an acceptance, yet a promise to pay or accept an existing foreign bill is of itself an acceptance. *Byles on Bills* 147. And as the law stood in England prior to the statute of Geo. 4, so it now prevails in this State. The only distinction made in our statute between foreign and inland bills is that damages on bills drawn on any person beyond the seas and returned unpaid with legal protest, shall be twenty per cent. in addition to the amount of such bills. *Amended Code* 356.

The English judges lamented that anything short of a writing on the bill should have been considered as an acceptance, but that such was considered to be the law until a comparatively recent period, is established by adjudged cases and by the passage of the Act of 1 and 2 Geo. 4, requiring written acceptances on bills. So general and so long continued had been the usage among merchants of accepting bills by parol, that this law has received a very liberal construction by the courts, and almost *any* writing or mark made by the drawee on the bill signifying that the bill has been “presented,” or “seen,” has been held to be a valid acceptance without the signature of the acceptor.

The validity of parol acceptances has been sustained by the courts in several of the States of the Union, where the subject is

not controlled by statute, and by the Supreme Court of the United States. By the revised statutes of New York an acceptance is void unless made in writing, but prior to the revision it was held that a parol acceptance was binding. *Leonard v. Mason*, 1 *Wend.* 522. In *Fisher v. Beckwith*, 19 *Vert.* 31, a case parallel with the one before us, the court said: "There is no rule requiring that the bill should be actually shown to the drawee in order to a valid and binding acceptance; it is enough if, when applied to for acceptance, he is enabled, by seeing the bill or otherwise, to give an intelligent answer. And in *Coolidge v. Payson*, 2 *Wheaton* 66, a verbal promise to accept a bill of exchange not yet drawn was adjudged binding. Judge Story regretted that the doctrine of such virtual acceptances ever was established, but he did not deny that such was the law, only contending that the doctrine was alone applicable to such bills as were payable on demand or at a fixed time after date. In England the validity of parol acceptances of foreign bills is still recognized, and in *Billing v. Devaux*, 11 *L. J.* 38 *C. P.*, it was held that any conduct of the drawee by which he intended the holder should understand that he meant to accept or pay will amount to an acceptance.

When we come to look for the principle on which these cases have been decided, there is no difficulty in understanding it. In the absence of statutes regulating these matters, the custom of merchants and bankers shapes the law. The acceptance of a draft or bill is a fact to be proved, like any other fact, to the satisfaction of the jury. The character and mode of proof are settled by the law merchant and the practice of the courts. The legislature can intervene, when it chooses, to require every acceptance to be in writing and signed by the acceptor, and even attested with the same care and formality as the execution of a will or the assignment of a bond, but in this State it has so far abstained from interfering with the common law and commercial usages in this respect.

An acceptance is no more than an admission that the acceptor has funds or property of the drawer, and a promise to pay the money to the holder of the bill. It is not a promise to pay the debt of another, and is not, therefore, within the statute of

frauds. The policy of allowing actions to be maintained on parol acceptances is fairly subject to discussion and criticism, as opening the door to fraud, or at least to mistake and misunderstanding, arising from the lapse of time and the uncertainty of spoken words and of memory; but we cannot declare the law to be different from what we find it to be both in England and in our own courts.

There is another view which may be taken of this case that was not alluded to in the argument. Denny's order was for the whole amount due to him from Mr. Smithers. When a bill has been accepted, it is considered as an assignment to the payee of a debt, or part of a debt, due from the drawee to the drawer, and binds the funds for the use of the payee. But where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and *after notice* to the drawee it binds the fund in his hands. If an order is drawn for a part only of a general or particular fund, it does not amount to an equitable assignment of that part, or give a lien as against the drawee, unless he consent to an appropriation by an acceptance of the draft. The reason is that a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. *Mandeville v. Welch*, 5 *Wheaton* 277.

Judgment for the defendant,

JOHN DOE, on the demise of WILSON L. CANNON, guardian of
HENRY STOUT and EMMANUEL J. STOUT, v. RICHARD ROE,
casual ejector, and CATHARINE KILLEN, tenant in possession

In ejectment where the defendant claims title to the land for his life as tenant by the courtesy, it is competent to prove the reputation in the family of the mother at the time that the issue was not born alive.

The existence of independent, separate life in a child after its birth is a fact to be proved by competent and credible testimony. And the burden of

proving it rests on the defendant who claims title to the land for his life as tenant by the courtesy. There are no legal presumptions in such a case in favor of the existence of independent, separate life in a newly born child.

Respiration or breathing is evidence of such life and existence, but it is not necessary to prove the fact of respiration or breathing from actual observation. There are other indications of it, among which the beating of the heart and the pulsation of the arteries after the separation of the child from the body of the mother may be considered satisfactory evidence of it, because they show the fact that circulation has been established and is maintained and carried on in the body of the child independently of the mother, it then having no connection with her body.

THIS was an action of ejectment to recover a house and lot and premises situate in the town of Dover. Both parties to it claimed under the same title, derived from Henry Stout, deceased, who died intestate seized of the premises, leaving to survive him as his heirs at law three children, Henry Stout and Emmanuel J. Stout, the real plaintiffs in the action, and a daughter who intermarried with and became the wife of Rev. Henry Hall, but died soon after the birth of her first child, which if born alive lived but a very short time. In the partition of the real estate of the deceased, their father, the premises in question had been assigned to the daughter, and since her death the real defendant in the action had been in possession of them under a lease from her husband, Mr. Hall, who claimed to be entitled to them for the term of his life as tenant by the courtesy; and the only question of fact involved in the case was whether the issue was born alive.

Dr. George Gooddell, of Burlington County, New Jersey, a witness for the plaintiffs, testified that he resided eight miles from Bordentown and had been acquainted with Mrs. Hall more than a year before her death. She and her husband resided about seven miles from him. They were married in the latter part of the year 1869 or in the first part of the year 1870, and she died in about eighteen months afterward. She was confined and delivered on the 25th of April, 1871, and died on the 1st day of May following. She was in labor about fifteen hours after his arrival, and he was with her during the whole of the time after that until her delivery. She was seized with puerperal

fever. He discovered in the child no evidence of respiration or breathing, nor any sign of muscular motion. He afterward said that he did not say, or mean to say, that the child did not breathe, but only that he did not observe it. It was a large and well-developed child, and came after its full time. He did not specially look for such signs of life. It was a perfect child, full grown and large. When he said he saw no signs of motion in it, he meant no external signs of motion in the muscles or limbs of it. But he was not looking for any signs of motion in it.

On the next witness, Hon. John A. Nicholson, being called, the counsel for the plaintiff announced to the court that they proposed to prove by him the reputation in the family at the time of its birth that it was not born alive.

Smithers, for the defendant, objected to the admissibility of such evidence in such a case. 1 *Greenl. Ev. sec.* 138.

Comegys, for the plaintiff, *contra*, cited 1 *Greenl. Ev., secs.* 103, 104.

The Court overruled the objection and admitted the testimony.

The witness then stated that his wife and Mrs. Hall were cousins, and the reputation in the family is that she died without having issue born alive. He heard it about the time of her death, but he had since heard it contradicted by Mr. Hall. It was buried here in the Presbyterian church-yard, and the body was sent here from New Jersey by express, without any one to accompany it, except the officers of the express company who had it in charge. It arrived at night between eight and nine o'clock and was buried the same night without any funeral ceremony.

The plaintiffs here rested.

Dr. George Gooddell was then called to the stand as a witness by the counsel for the defendant, and further testified that

the mother had reached the full term, but her labor was a protracted one, and undoubtedly had the effect to render the child more feeble. It was alive in the womb. After delivery its flesh was firm, its lips were ruddy, and its whole appearance was a natural one. The presentation was also a natural one. The beating of its heart was strong, and he not only felt it, but also heard it. The pulsation of the umbilical cord was also strong, and was also strong in the temporal artery; the cord, too, was natural and healthy in its appearance, and it was not until twenty minutes after the child's complete birth that the cord was severed, and the heart continued to beat for about five minutes after that; and the temporal artery also, but not so strong as the heart. Dr. Page and himself did what was usual in such cases to prolong the life of the child, by dashing water on its body, blowing into its lungs, rotating it from side to side, and, as a last resort, by a warm bath, and it was in the bath it died. In his opinion it had, during that time, an independent circulation and existence of its own, and was a living child. And he so thought then and had so thought ever since. It died, he thinks, of exhaustion consequent upon the protracted labor of the mother. The lips continued red after the umbilical cord was severed, and gradually faded. He did not look for any respiration or muscular motion, because he had no doubt that it was all that time a living child, and his only concern and object was to preserve and prolong the life of it.

On cross-examination he added that the mother was seized with puerperal convulsions two or three hours before her delivery, when he sent for Dr. Page. Before his arrival he had bled her, and soon after his arrival they concluded to apply the forceps in her delivery. After that there were at intervals pains, or efforts on the part of the mother to deliver the child, but they became more feeble, and it was at such intervals, perhaps as many as twelve in all, they would use the instruments, and they were in all about a half an hour in using them. Such instruments were very frequently used in delivery, and there was no perceptible injury produced by the use of them in her case. They resorted to dashing cold water a dozen times on the body of the child before the umbilical cord was cut, and blowing into

its mouth and rotating its body from side to side and by pressure upon and compression of the chest to produce respiration; that was their object; but it did not produce either respiration or crying that he could perceive. It was very soon after the circulation had ceased in the umbilical cord that it was cut. The child was about eighteen inches long. It was in the bath from five to ten minutes, and all pulsation in it had ceased before it was removed from it. The object of all these efforts was to produce respiration, which he was anxiously hoping for all the while, but which he did not at any time perceive. It had an independent circulation of its own after the delivery, and by that he meant that there was then no muscular connection subsisting between it and the mother. The pulsation in the cord after delivery usually continues from three to five minutes, and soon after respiration begins it ceases, and it is usual to sever the cord as soon as respiration ensues and the pulsation in it ceases. The pulsation of the heart and the temporal artery continued twenty-five or thirty minutes after the child was delivered. The blood and circulation of the child in the womb is entirely separate and distinct from the blood and circulation of the mother, and it may continue alive in the mother's womb after her death and be taken alive from it after her death, as has been done in the Cæsarian operation. There are well-authenticated cases in which the suspension of respiration has continued for as much as thirty minutes after delivery.

Dr. Richard A. Page, of Columbus, in Burlington County, New Jersey, testified that he was in attendance also on Mrs. Hall in her confinement, and reached there about nine o'clock that evening, and she was delivered about eleven o'clock. Found her condition and appearance as before described by Dr. Gooddell. The child was born alive and continued so after its complete delivery from the mother about thirty minutes and five to six minutes after the separation of the umbilical cord. The pulsation in the cord had then ceased, and there was then a separate and distinct circulation of the blood of the child independent entirely of the mother. It was then alive, he had no doubt, and that life was entirely independent of the mother. It died in the bowl, a natural death, produced, he thought, by the

protracted labor of the mother in part, and in part, perhaps, from the congestion of the brain. He was satisfied that there was circulation of the blood going on from the distinct throbings of the heart. They were endeavoring to establish respiration, and were not watching for any slight manifestation of it, but for a gasp or a cry. They considered and they knew that there was life in it, or they would not have made any effort, much less such particular efforts, to establish respiration. He gave the certificate that it was still-born, because it is the custom, sanctioned by practice and by medical authority, to give such a certificate for such a purpose as that for which it was given when a child dies in the womb, or in a short time after its birth, from natural causes; and if respiration in this case had been established and it had breathed, but had died in so short a time after its birth, he would have given the same certificate. All such are called still-born, and are so termed by custom and by physiologists and by physicians in giving such certificates.

Dr. Alexander Penrose, of Philadelphia, and professor of midwifery and obstetrics in the University of Pennsylvania, was then called to testify as an expert, and stated that he had heard the testimony of both of the preceding witnesses, and his opinion, based upon it, was that the child was born alive, and he had no doubt of it. The first or chief sign or evidence of life in all cases is the beating of the heart, and he was clearly of opinion from all they had stated in regard to it that it had a circulation and existence absolutely independent of the mother.

Dr. John J. Reese, of the same city, and professor of medical jurisprudence in the same university, and practicing physician of thirty years' standing, was next called also to testify as an expert, and after stating that he had heard the testimony of Dr. Gooddell and Dr. Page in the case, added that the opinion which he had upon it was that the child was alive after its birth, and had an absolutely independent existence of its own after the umbilical cord was cut, and which after that could not have been in any degree dependent upon the mother. The best sign of life is the beating of the heart. Life may exist, but cannot be continued without breathing. The pulsation of the umbilical cord proceeds entirely from the beating of the child's heart,

and in no degree from the circulation of the blood in the mother. The pulsation of the cord before delivery is always positive and indubitable proof that the child is alive in the womb of the mother. In his opinion that child's heart beat and moved by virtue of its own inherent vital force and power. The beating of the heart and the pulsation and circulation of the blood through the arteries and veins of the body is the best evidence of the existence of life. In his opinion upon the facts proved in this case there must have been some slight but imperceptible breathing on the part of this child before it died and after the cord was divided. Life cannot continue more than two or three minutes with the air entirely excluded from the lungs. The lips and lungs are full of blood, and in health are red or ruddy in color, and the existence of that color in the lips is one of the best evidences of life, for as soon as death takes place that color fades from them and they become pale. After a child is completely delivered, even before the cord is severed, there can rarely be any physiological connection existing between it and the mother; but so long as the placenta continues to adhere to the walls of the mother's womb, the foetal circulation through the cord may continue even after complete delivery.

Two other physicians were examined and testified as experts on behalf of the defendant in the case, and expressed their opinion on the evidence of the attending physicians that the child was born alive. And three were then called and examined as experts on the other side, the first of whom testified that he had an experience of thirty-seven years in the practice of his profession, and that it was not uncommon in cases of suspended animation on the birth of children to witness such indications as had been detailed in their testimony, and in his opinion they may be the result of a residuum of the foetal circulation merely, and this may be after the umbilical cord has been divided and the connection with the mother has been severed. He considered and called a child so born, and dying without breathing or any motion of the limbs or muscles, a still-born child, but a new-born child that dies after having breathed he never called or considered a still-born child, but a child born alive. After the severance of the cord the circulation he had spoken of might

continue several minutes before it would cease and death would be evident. The second expressed the same opinion and said foetal life continues after birth so long as it continues to derive its nourishment from its foetal condition and connection, and until it begins to derive its support from another source and respiration begins; and it cannot have a complete and independent existence of its own until then. The last concurred in the same opinion.

Saulsbury (*Comegys* with him), for the plaintiffs: The child was not born alive, or was not a living child at its birth, for there was no independent existence of its own at any time, even after the navel cord was cut, if the pulsation of the heart and the circulation of the blood was but a continuation of the pulsations of the heart and of the circulation of the blood which existed whilst it was yet in its mother's womb and at the instant of its extrusion from it. For although that might be called life in a limited and imperfect sense, it was not life in the sense contemplated and required in the common law of the land to entitle the father to the real estate of the mother, and his wife, on her death, for the term of his life, as tenant by the courtesy. Without respiration or breathing the breath of life after its birth there could be no such life as the law recognizes in this child. And if that the very inception of its independent self-existence as a living creature from the hand of its divine Creator never takes place, and in the course of nature never can take place, it never can be alive, and, of course, never can be born alive in the true and proper meaning of that term. *Marsellis v. Thalhimer and others*, 2 *Paige* 35; 4 *Vez.* 227; *Paine's Case*, 8 *Rep.* 34. The judicial decisions on the question in civil cases are but few it seems. In prosecution for infanticide, however, the cases in which the question has arisen have been numerous, and in all such cases it seems to have been held necessary to prove respiration on the part of the infant after its birth and independent circulation by means of it to convict the accused of the crime of killing it. *Rex v. Poulten*, 24 *E. C. L. Rep.* 344; *Rex v. Enoch*, 24 *E. C. L. Rep.* 446; *Rex v. Brain*, 25 *E. C. L. Rep.* 433; *Rex v. Sellis*, 32 *E. C. L. Rep.* 767; *Rex v*

Crutchley, 32 E. C. L. Rep. 749; *Taylor's Med. Jur. (Fish v. Palmer)* 480; *Beck's Med. Jur.* 410; 3 *Greenl. Ev.*, sec. 136; *Wills on Circum. Ev.* 230; *Whart. Amer. Cr. Law* 286, 342, 343; *Bouv. Law Dict.* 48; *Whart. & Stille's Med. Jur.* 337. Under the later rulings pulsation may now be sufficient, but it must be proved to have continued long enough after the division of the umbilical cord to show that it was the result of respiration, and that the child must have had by its respiration an independent circulation and existence of its own. It was incumbent upon the defendant to prove that the child was born alive or the plaintiffs must recover. *Taylor's Med. Jur. (Lewellan v. Gardner)* 214. And if the jury should have a doubt as to that they must find for the plaintiffs.

Smithers (Ridgely and Layton with him), for the defendant: The contention on the other side is that it must be proved that the child breathed, or there was not sufficient evidence in law that it was born alive, but there is no such principle of law in the case. The issue must be born alive is all the rule of law prescribes and requires in the case. *Co. Lit. Ten. by the Court*. But this rule has been modified by positive law in some other countries, as in France and Germany, and is therefore denominated in those countries legal life for the purposes of succession to property. Physiological or natural life, however, is all that is required by the laws of England and this State. Under our law the question simply is, Was it born alive or born dead? And nothing more nor less than that. Respiration or breathing is but one of the evidences or manifestations of life among several others well known and recognized both in law and fact. *Rev v. Brain*, 25 E. C. L. Rep. 433. In that case the respiration or breathing of the infant in question was absolutely negatived by the proof in it. *Wills on Circum. Ev.* 270. The child may acquire an independent circulation without having breathed, nor is it material that it remains attached to the mother by the umbilical cord, if it has acquired an independent circulation. 3 *Greenl. Ev.*, sec. 136; *Whart. Amer. Cr. Law* 343, 358, 359, 371; *Tayl. Med. Jur. (Fish v. Palmer)* 207, 213. Sir John Stewart, Vice-Chancellor, in a case of succession to property in

1851, said on this subject that the beating of the heart is sufficient to constitute legal evidence that the child was born alive. A single vital function, such as pulsation clearly proved, is sufficient legal evidence that the issue was born alive. *Paine's Case*, 8 Rep. 34; *Tayl. Med. Jur. (Rex v. Brain)* 354 (*Rex v. Sellis*) 354; 3 *Greenl. Ev.*, sec. 136. If the jury should believe from the evidence in the case that the child was born alive the plaintiffs were not entitled to recover and their verdict should be in favor of the defendant.

The Court, Gilpin, C. J., charged the jury: That the existence of independent, separate life in the child after birth is a fact to be proved by competent and credible testimony in such a case as this, and the burden of proving this fact rests on the defendant in it, and therefore they must be satisfied from the evidence which they had heard at the bar of the court that the newly born child in question was wholly brought forth from the body of the mother, and that it was born alive, having an independent circulation and existence of its own, in itself and of itself, not being dependent upon the mother, but entirely independent of her, a life and circulation existing in the child apart from the mother by force of the child's own proper, inherent vitality. Whether the child of which Mrs. Angelica S. Hall was delivered on or about the 25th of April, 1871, was born alive, having such an independent circulation and existence of its own, was a question of fact to be determined by the jury from all the evidence before them. The court cannot pass upon that question or express any opinion in regard to it. It is proper, however, that we should say to you that in such a case as this there are no legal presumptions in favor of the existence of life in a newly born child, on the contrary, the fact of life, independent life and existence in it, must be proved as any other fact in order to entitle the father of it to claim and hold the real estate in question for the term of his own life as tenant by the courtesy. Mere foetal life, that is to say, that life which is incepted in the womb of the mother, and which is derived from and dependent upon the mother, is not sufficient for this purpose. On the contrary, the child's life must in fact be distinct from and independent of the mother.

It must have an independent existence of its own, manifested by an independent circulation within its own body after birth. Respiration or breathing is certainly evidence of life, but we do not think it is necessary to prove the fact of respiration from actual observation if such independent circulation is established and shown. It has been held that life may exist in a newly born child without proof that it was observed to have breathed; indeed, it has been held that life may exist for a time without respiration. It is only one of the signs which manifest the existence of life. There are other signs or indications of life, among which the beating of the heart and pulsation of the arteries after the separation of the child from the body of the mother may be considered satisfactory evidence of life in the child, because they show the fact that circulation has been established in the body of the child and was maintained and carried on in the body of the child independently of the mother, it having then no connection with the mother. Which fact, namely, the fact of an independent circulation after the navel cord has been severed, may be considered by the jury as evidence that the child in this case had a separate and independent existence or life of its own and was born alive, although there was no proof from observation that the child had ever actually breathed.

If, therefore, the jury should be satisfied from the evidence that the child which was brought forth from the body of Mrs. Angelica S. Hall was born alive, having an independent circulation and existence of its own in the sense and meaning in which he had endeavored to explain the matter to them, their verdict should be in favor of the defendant, or not guilty of the trespass and ejectment in the declaration alleged. Otherwise, it should be in favor of the plaintiff, or guilty thereof.

The defendant had a verdict.

HENRY C. WOLCOTT v. EDWIN P. SHAW.

When the record states that both parties appeared on the first day for trial, and that the case was continued on the application of the defendant, and that on the second day, the plaintiff being absent, it was continued again without stating on whose application or any reason therefor, the court will presume that it was done by the justice of his own motion to afford a fair opportunity for the trial of the case.

CERTIORARI. The record stated the appearance of both the plaintiff and defendant, on the 15th day of September, 1873, the return day of the writ, and the defendant not being ready for trial claimed a postponement of the case until the 29th day of September, 1873, and that on that day the defendant appeared, but that the plaintiff did not appear and the case was continued until October 6th, 1873, when the defendant having failed to appear, after hearing the allegations and proofs of the plaintiff judgment was rendered by default against the defendant and in favor of the plaintiff for, etc.

The exception was that the justice of the peace adjourned the hearing of the case on the 29th of September, 1873, without application of either party, and without any reason being assigned or appearing therefor of record.

By the Court: The first adjournment was on the application of the defendant, and although it was not stated that the second adjournment was on account of the absence then of the plaintiff, it was but reasonable to presume that it was done by the justice of his own motion for that reason, and to afford a fair opportunity for the trial of the case. The judgment is therefore affirmed.

JOSHUA R. CLEMENTS v. CHARLES WILLIAMSON, late Sheriff.

In a sale of land by the sheriff on execution process, an advertisement of the sale must be delivered ten days at least before the day of sale to each plaintiff in the execution, and also to each plaintiff in any other execution or executions at the time in the hands of the sheriff.

RULE to show cause wherefore the sale of his lands by the late sheriff should not be set aside, on the ground that they

were advertised and sold on a writ of *alias levare facias*, returnable at the present term of the court, but that no copy of the advertisement of the sale was served upon James R. Clements, John A. Cavender, The Kent County Mutual Insurance Company, Hewett L. Knight, and Jacob Twiley, the plaintiffs in other executions against him, the said Joshua R. Clements, then in the hands of the said late sheriff at the time of making the said sale, and that the price for which they sold was below their actual value.

On the hearing of the rule the fact appeared, as alleged in the affidavit, that there were such other executions at the suit of the parties named against the plaintiff in the rule in the hands of the late sheriff at the time of the sale, and that copies of the advertisement of the sale were not served upon the plaintiffs in them.

By the Court: It is expressly provided in the second paragraph of the twenty-third section of chapter one hundred and eleven of the Revised Statutes, that an advertisement of the sale should have been delivered to each plaintiff in the execution, and also to each plaintiff in any other execution or executions at the time in the hands of the sheriff in such a case. *Rev. Code Amend. 679.* But as this was not done, the sale must be set aside. Rule made absolute.

Reed, attorney for the plaintiff.

Comegys, attorney for the defendant.

ALBERT M. QUINBY and WILLIAM H. WEEKS, trading as A. M. QUINBY & CO., v. THE MAYOR and COUNCIL of the CITY of WILMINGTON, owner, and WILLIAM H. FOULK, contractor.

The mechanic lien law imperatively requires that a party who furnishes materials for the repairs of a building on the credit of it, shall file a statement of his claim therefor in the office of the prothonotary of the county wherein it is situated within sixty days from the last delivery of the materials, but

if after the delivery of them is finished, he receives from the contractor to do the repairs and supply the materials for the purpose to whom he furnished them, and within the sixty days his promissory note for the amount due for them, payable to his order three months after date, it will not only suspend his right to sue the contractor, or the owner of the building until the maturity of the note, but it will constitute in effect a complete waiver of his legal right to file a statement of his claim and obtain a judgment and lien upon it against the owner under the statute.

Scire facias sur mechanic's lien. The pleas were first *nil debit*, and secondly, that Foulk, the contractor, after the work was finished gave the plaintiffs and they received his promissory note, payable three months after date, in payment of the amount due for it. The claim was for materials furnished in repairing the City Mill, which Foulk, who was a carpenter, had contracted with the mayor and council to repair and furnish the materials for the purpose. The delivery of the materials was commenced on the 22d day of November and the work was finished on the 6th day of December, 1873. The promissory note of Foulk was dated and given on the 6th day of January, 1874, for six hundred and twenty-five dollars and thirty-one cents, and the claim of the plaintiffs, which was for four hundred and forty-one dollars and eleven cents, with interest from January 1st, 1874, was filed and the *scire facias* thereon was issued on the 3d day of February, 1874. The book of original entries of the plaintiffs showed that their account for the work and materials had been opened and entered against *W. H. Foulk*, City Mill. It also appeared in evidence that thirty dollars and ninety cents worth of the materials furnished was temporarily used for scaffolding only during the work, and was afterward removed and appropriated by Foulk to his own uses, and that a treasury warrant of the city for six hundred and ten dollars and twenty-four cents was delivered to Foulk in full payment of his contract on the 11th day of December, 1873, and was immediately afterward paid and taken up by the city treasurer. Before the maturity of Foulk's promissory note the plaintiffs had it discounted in bank, and having been protested for non-payment at maturity, they had taken it up and repaid the amount of it to the bank. The amount of the account which they had submitted to Foulk including these and also other charges which they had against

him, was six hundred and sixteen dollars, and with interest thereon six hundred and twenty-five dollars and thirty-one cents.

Patterson, for the plaintiffs: This is a proceeding *in rem*. *Serg. on Attack*. 200, 205, 208, 209, 213, 214. The taking of the promissory note was not a waiver of the lien, nor was the acceptance of it a satisfaction of the claim. *Serg. on Attack*. 121, 292 *Brown's Pa. Rep.* 297; 1 *Miles* 214; *Serg. on Mech. Lien* 189; 4 *Watts & Serg.* 257; 8 *Cow.* 77; 8 *E. C. L. R.* 7. It was only collateral security for the claim until one or the other of them was paid. 3 *Serg. & Rawle* 33, 193; 12 *Penna.* 340; 24 *Penna.* 510; 5 *Watts* 118; 9 *Watts* 283; 2 *Iowa* 508; 7 *Blackf.* 218; 6 *E. B. Smith's Rep.* 657; 4 *R. I.* 383; 40 *Mo.* 260; 9 *Mo.* 58 30 *Mo.* 263; 1 *Stockt.* 314; 5 *Johns.* 68; *Phil. on Mech. Liens, secs.* 273, 275, 278, 279, 286, 295; 14 *Serg. & Rawle* 32; 39 *Penna.* 226; 1 *Hill* 516; 3 *Barb.* 409. A security to destroy or utterly annul the lien must be intended to take the place of the lien, which a promissory note could not do. 4 *Dutcher* 39. And the lien itself and the legal enforcement of it are entirely different in their nature and elements. *Phil. on Mech. Lien* 282; 322, 334, 340, 2 *Pars. on Bills and Notes* 156.

Spruance, for the defendant: In the first place, it clearly appeared as a fact in this case from all the circumstances disclosed in the evidence that the materials were not furnished on the credit of the building in question, but on the credit of Foulk, the contractor solely, and the special privileges conferred by statute on this class of preferred creditors, being in derogation of the common law, was required by a well-settled and wise rule of it to be construed strictly, and therefore that every claimant under it is bound to bring his case clearly within the special provisions of it to entitle himself to the benefits of it; and where it not clearly so, but doubtful or uncertain merely, the construction of the statute must be against his claim.

By the general rule of law on the subject, the taking of a promissory note is not payment or discharge of the pre-existing debt for which it was given, but if it is so agreed or intended

by the parties, it operates as an absolute payment, and the original debt will be discharged. *Phil. on Mech. Lien, sec. 275; Serg. on Mech. Lien 189; 4 Watts and Serg. 257; 30 Wise 521; 9 N. J. 314.* And according to the cases just cited it was evidence of such an intention. But even where it is not so given and taken, yet if it is by its terms made payable at a future day, the right to sue for the original debt is suspended till the maturity of the note. *Phil. Mech. Lien, sec. 275; 3 Wall. 37; 5 Johns. 68.* And the taking of a note payable after date for such a claim suspends the enforcement of the mechanic's or material man's lien until the maturity of the note, or the credit on it has expired. *Phil. Mech. Lien, sec. 276; 4 B. Monro 61; 4 B. Monro 81.* And where time is given to the contractor by the material man, the building is discharged from the claim and the lien. *Hill v. Witmer, Serg. on Mech. Lien 191.* The indorsement and negotiation of the note by the plaintiffs suspended their right to sue for their claim until the note was returned to them unpaid after its maturity. *Phil. Mech. Lien, sec. 278; 12 Cush. 389; 2 R. I. 270.* And it has been held in Iowa that the negotiation of a promissory note given for such a claim destroys the right to a lien. *Phil. Mech. Lien, sec. 278.* And in Rhode Island that notice of the lien may be filed, but not a petition to enforce it, inasmuch as the latter was the institution of an action for the enforcement, security, and collection of it before the note was due and payable, and whilst it was yet in the hands of a third party. But that seems to have been under some special and peculiar provision of their statute, which is not to be found in ours.

Patterson: The negotiation of the note suspended the right to sue upon the claim until it matured and was protested, but the right in the meanwhile to file the notice of the lien continued. *Phil. Mech. Lien, sec. 278; 2 R. I. 270; 12 Cush. 389.* There is a distinction between filing notice of the lien and instituting suit on the claim. *Phil. Mech. Lien, sec. 282; 1 W. Va. 249; 30 Mo. 263; 31 Mo. 465.*

The Court, Houston, J., charged the jury: That the facts in

the case were not disputed, and as the only question involved in it, and on which it depended before them, was a question of law exclusively, he would proceed to state to them what the law of the case was, and by which they should be governed in making up their verdict.

What may be the particular provisions in the mechanics' lien laws of other States for filing notice merely of such liens without formally filing the claim itself on which it depends we are not informed, but there is no provision whatever of the kind in our statute on the subject to authorize or warrant the filing of notice of any such lien except by filing the claim itself to which it is incident in the mode and manner expressly provided for and required in it. And in a case like this, which is the claim of the plaintiffs as material men against the city of Wilmington for certain materials furnished for the repair of a mill belonging to it, called the City Mill, and which were furnished by them not directly to the city, but to one William H. Foulk, a carpenter, for the purpose, who had contracted with the city to do the repairs and furnish the materials, that provision of our statute imperatively requires that the claim of a party furnishing materials in such a case on the credit of the building to be repaired, either to the owner of it, or to any such contractor, shall be stated and filed in the office of the prothonotary of the superior court in and for the county wherein such building is situated within sixty days from the last delivery of materials furnished for the purpose, to entitle such a party to the benefits of the statute and to such a lien upon the property. And we took occasion in a former case before this court under the statute, *France v. Woolston*, 4 *Houst.* 564, to state the obvious reasons for this imperative requirement of the statute, and, among others, that it was evidently considered contrary to wisdom and sound policy that such an incumbrance should be allowed to exist for any greater length of time without thus being made a matter of public record. And that, therefore, suit should be instituted on every such claim in the special mode directed by the statute within that time.

According to the statement of the claim filed by the plaintiffs and their book of original entries, the delivery of the materials by them was commenced on the 22d day of November, 1873, and

was finished on the 6th day of December, 1873; and that the statement of their claim for them, amounting to four hundred and forty-one dollars and eleven cents, with interest from January 1st, 1874, was filed in the office of the prothonotary of this court, as appears by the record, on the 3d day of February, in that year, and within sixty days from the last delivery of the materials furnished by them. But it also appears from the evidence, and is not disputed, that they received and accepted from William H. Foulk, the contractor, to whom they had furnished the materials under their contract with him, on the 6th day of January, 1874, his promissory note for six hundred and twenty-five dollars and thirty-one cents, payable in three months from that date to their order, and which it is admitted included as a portion of the consideration for which it was so given by him and received by them the amount of their present claim as stated against the defendant, the City of Wilmington, for the materials so furnished and delivered by them. They afterward had the note discounted at the Farmers' Bank, in Wilmington, but Foulk, the maker, failed to pay it at maturity, and they had to take it up afterward at the bank. The city had, however, paid Foulk six hundred and ten dollars and twenty-four cents in full of his contract with it for the materials and his work in repairing the mill as early as the 11th day of December, 1873. Under these circumstances it is not necessary, in our opinion, to inquire whether they furnished the materials on the individual credit of Foulk, or, as they have since alleged, on the credit of the building that has been repaired with the materials. By the term of credit given in the promissory note it was not payable until the 9th day of April, 1874, and we are clearly of the opinion that during that time and until the maturity of the note their right to institute any suit for the claim or demand, either under the statute or otherwise, against any one, either Foulk or the city, was suspended, and inasmuch as the sixty days within which their claim could alone be rightfully filed under the statute must necessarily have elapsed before the three months' credit on the note had expired, the credit thus given constituted in effect a complete waiver of their legal right to proceed under the provisions of it to recover a judgment and secure a lien upon their

claim for the materials against the defendants. For nothing short of the recovery of judgment on the claim so stated and filed completes and secures the lien in such a case under the statute. The plaintiffs are therefore not entitled to recover in the action, in our opinion, and your verdict should accordingly be for the defendants.

The defendants had a verdict.

ROBERT McCaULLEY *v.* NICHOLAS JENNEY.

If the president of an incorporated company which has no seal executes articles of agreement as president of it, under his hand and a common scroll for a seal, it will neither be his own individual covenant, nor the covenant of the company.

THIS was an action of covenant on a contract under seal by which the plaintiff agreed with the defendant, Nicholas Jenney, president of the Wilmington Rifle Club, that he would furnish the material and do all the plastering on the buildings of the club for a certain price per square yard, and which the latter agreed to pay him therefor. Although incorporated by an act of the legislature, the club had never had a corporate seal, but each of the parties had executed the contract by subscribing their names and affixing their respective seals to it in the form of scrolls made with a pen; the defendant, however, adding to his signature at the time of subscribing it the words, "President of the Wilmington Rifle Club." The action upon it was not against the club, but against Jenney personally, and one of the pleas was that he never signed it, except in his official capacity as president of the club, and it was therefore not his personal covenant which was traversed in the replication and on which issue had been taken before the jury. The act of incorporation and the deed of the club for the buildings and premises were put in evidence by the defendant.

Nields, for the plaintiff: The club in question was a lawfully organized incorporated company, but it was not a party to this

instrument and did not purport on its face to be because it was named as party to it, nor did the seal affixed to it even profess to be the seal of the company. And yet it was an instrument under the hands and seal of the parties who executed it, and viewed in that light it must be considered and held to be the individual covenant of the defendant. When a party acts as the agent of a government, or of a public or municipal corporation, the principal will be bound although he does not name it, but the rule is otherwise in respect to a private corporation or an individual. *Story on Agency*, sec. 147; 11 *Serg. & Rawle* 126; 8 *M. & W.* 833; 9 *N. H.* 263; 7 *Cow.* 452; 13 *Johns.* 307; 21 *How.* 287.

Bird, for the defendant: The intention of the parties to the contract was clearly manifest, and as much so on the one side as on the other, and that understanding was by both of the parties that the defendant was contracting for the work on behalf of the club and the company and as the president of it and not on his own account individually, and he therefore cannot be personally liable in this or any other action for the demand. 19 *Johns.* 60; *Ang. & Ames on Cor.*, sec. 296; 43 *N. H.* 343; 30 *Barb.* 218; 21 *Pick.* 417; 9 *Mass.* 336; 37 *Maine* 349; 6 *Conn.* 464.

The Court, Gilpin, C. J., charged the jury: That it was competent for the defendant, had he seen proper to do so, to have charged himself in the contract for the work to be performed by the plaintiff, so as to have made himself liable to him for it, but to warrant that construction of it such should clearly be the purport of the instrument upon its face. It was, however, neither his individual covenant, nor the covenant of the club and the incorporated company of which he was the president; first, because he executed it on behalf of the company and as the agent and president of it, and not in his own name or on his own part individually; and, secondly, because it is not sealed with the seal of the company, and for the best of reasons, as appears from the evidence, that it has never had one. Nevertheless, if the contract was so made and executed by him with

the sanction and consent of the company and for the company, the plaintiff would not be without his remedy in another form of action against it to recover for his labor and materials under the contract.

JOHN S. MITCHELL, SAMUEL B. V. VANCE, EDGAR M. SMITH, JAMES F. TRAVIS, CHARLES BENEDICT, AARON BENEDICT, and JOHN W. BUCHANAN, trading in the name and style of MITCHELL, VANCE & CO., v. PHILIP GARRETT, WILLIAM FERRIS, and ZIBA FERRIS, trading in the name and style of FERRIS & CO.

Whatever may have been at one time the impressions to the contrary, it is now well and definitely settled that to render a judgment recovered in the courts of one State final and conclusive in the courts of another under the provision of the Constitution of the United States and the act of Congress on the subject, the court in which it was recovered must have had jurisdiction of the subject-matter of the suit, or the cause of action, and of the parties to it, and particularly of the defendants, and when it assumes the character of an action or proceeding *in rem*, that it had jurisdiction of the *res* or the thing itself; for in each of these respects the jurisdiction of the court rendering the judgment may be contradicted, inquired into, and disproved in the courts of another State, notwithstanding the provision of the constitution and the act of Congress in relation to the matter.

Nor will a judgment recovered in a court of another State, by the record of which it appeared that the defendants in it resided at the time out of the State and had never been served with process in the suit, nor voluntarily appeared to it, be considered by the courts in this State to constitute at common law sufficient *prima facie* evidence of a legal indebtedness on the part of the defendants to the plaintiffs in it, to entitle the latter to recover here upon it in an action of debt, as well as in an action of *indebitantus assumpsit* on the judgment, independent of the provision of the constitution and the act of Congress before referred to.

By the common law of England and this country, a judgment of a court of law of competent jurisdiction recovered in a foreign country only imposes in the contemplation of it a legal obligation on the defendant to pay the plaintiff in it the sum so adjudicated to be due by it, on which an action of debt to enforce the judgment in their courts or our courts may be maintained at common law. But even in such an action at common law on a purely foreign judgment, if it appears by the record of it or it is proved on the trial that the defendant was not served with process in the foreign suit,

or did not appear to it either voluntarily or otherwise, or that the foreign tribunal which rendered it had not jurisdiction of the subject-matter of the suit or the cause of action, it is held to impose no legal obligation on the defendant to pay the judgment, and no action can be maintained at common law for it; and the jurisdiction of the foreign court which rendered the judgment in either of these respects may also be impeached and denied, inquired into and disproved, by evidence at the trial in any such action at common law upon it.

THIS was an action of debt at the suit of the plaintiffs against the defendants on a judgment recovered in the Superior Court of the State of Massachusetts, holden at Worcester, for the County of Worcester, at the September term, 1867, for six thousand nine hundred and nine dollars and four cents, on trustee process issued out of said court commanding the sheriff to attach the defendants, a firm doing business in the city of Philadelphia, in the State of Pennsylvania, and returned, summoned the defendants, and general demurrer to the declaration, as the whole record of the action in that court was set out in it. Heard before Wootten and Houston, Justices, at the last term, Gilpin, C. J., absent.

Gordon, for the defendants: The ground of the demurrer is that it is not a general judgment or a judgment *in personam* against the defendants, and was in fact obtained without service of any process upon them or any appearance of the defendants to the action or the proceeding in that court, and it was therefore not binding upon them, and no action could be maintained upon it in this court or in any court in this State. *Pritchett v. Clark*, 4 Harr. 208.

Macallister, for the plaintiffs: A judgment obtained in a court of any one of the United States has and is entitled to the same force and effect in every other State to which it is entitled in the State in which it is recovered. *Mills v. Duryea*, 7 Cranch 481; *Green v. Sarmiento*, 1 Pet. C. C. Rep. 80. And if it is final and conclusive in the State in which it is recovered, it will be so in every other State. *Phil. on Ev.* 174; *Curtis v. Gibbs*, 1 Penn. Reps.; *Field v. Gibbs*, 1 Pet. C. C. Reps. 155. And to show that this judgment is final and conclusive in Massachusetts, he cited

numerous sections of the statutes of that State. But if it is not conclusive in this State, it must have at least the effect of a foreign judgment, and is *prima facie* evidence of an indebtedness on which an action of debt, as well as *indebitatus assumpsit* will lie. *Walker v. Witter*, Doug, 4; *Sto. on Conf. of Laws*, secs. 592, 593, 599, 603, 608, 609; *Martin v. Nicholls*, 3 Scin. 458; *Sto. on Const.*, secs. 1311, 1312; 2 *Phil. on Ev.* 181; 1 *Stark Ev.* 276.

Bates, for the plaintiffs: This was not a judgment obtained on a foreign attachment in one State and sued upon in another, although at an early day before the adoption of the Federal Constitution it was contended by able counsel that such a judgment recovered in Massachusetts was final and conclusive in the State of Pennsylvania under the clause contained in the Articles of Confederation, that "full faith and credit shall be given in each of the States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." Art. 4. But the court held after reflection that a judgment obtained on a foreign attachment, as that was, could not be final and conclusive in another State. *Phelps v. Holker*, 1 Dall. 261. There are many ways in which jurisdiction may be given to courts of law. 1 *Stark Ev.* 276 *in note*. As to notice under trustee process in Massachusetts on the defendants, it appears by the record in this case that notice was given, and it is competent for the legislature in that State to provide how the writ may be served on the defendant in it, or how notice of the institution of the suit against him may or shall be given to him, so as to make the judgment recovered in it final and conclusive against him in that State, and that they have done with regard to their trustee process which was issued in this case.

Houston, J., delivered the opinion of the court: This is an action of debt on a judgment recovered by the plaintiffs against the defendants in the Superior Court of the State of Massachusetts, holden at Worcester, for the county of Worcester, at the September term, 1867, for six thousand nine hundred and nine dollars and four cents. It appears from the copy of the record that the suit there was upon what is termed

in that State trustee process, or process served upon either a nominal or a general trustee without any property of the defendants in his hands or control other than that which a fiction of law indicates in their practice, and that the plaintiffs were then engaged in business as a firm in the city of New York, and the defendants as a firm in the city of Philadelphia, and that none of the parties resided in the State of Massachusetts, and also that none of the defendants were served with process in the suit or voluntarily appeared or made any *défense* to it. The process was addressed to the sheriffs of the several counties of that State, and in substance commanded them to attach the goods or estate of the defendants, all of Philadelphia, in the State of Pennsylvania and co-partners doing business there, to the value of ten thousand dollars, and summon them (if they may be found in your precinct) to appear before the said court to answer unto the plaintiffs in an action of contract, to the damage, as they say, of ten thousand dollars, which shall then and there be made to appear with other due damages. And whereas the plaintiffs say that the defendants have not in their own hands and possession goods and estate to the value of ten thousand dollars aforesaid which can be come at to be attached, but have intrusted to and deposited in the hands and possession of Levi Stevens, of Fitchburg, in said county of Worcester, manufacturer, trustee of the said defendants goods, effects, and credits of the said value, we command you, therefore, that you summon the said trustee (if he be found in your precinct) to appear before the said court to show cause (if any he has) why execution to be issued upon such judgment as the plaintiffs may recover against the defendants in this action (if any) should not issue against their goods, effects, or credits in the hands and possession of the said trustee, etc., etc. To which the sheriff of the county made return indorsed thereon that he had summoned the within named trustee for his appearance at court by giving him in hand a true and attested copy of this writ, and that he afterward on the same day attached a chip as the property of the defendants within named and made diligent search for them and for their tenants, agents, or attorney, but could not find that they had any in his precinct.

The first count in the declaration sets forth the record at length, to which there is a general demurrer entered with an agreement of counsel that if it shall be overruled the cause shall stand over for trial without prejudice to the defendants from the admission of facts made by it.

There was consequently not only no service of the writ upon or appearance by the defendants to the writ, but there were no property, credits, or effects of theirs taken under it; and all this, as well as the residences and places of business of all the parties, both plaintiffs and defendants, clearly appears by the record to have been at the time out of the State of Massachusetts. But notwithstanding such a judgment so recovered has now become final and conclusive in that State by lapse of time and the failure of the defendants to appear since the entry of it to contest it, under the provisions of their statutes and the practice of their courts, and notwithstanding also the early ruling in the case of *Mills v. Duryea*, 7 Cranch 481, was much relied on by the counsel for the plaintiffs in the argument of this case before us to sustain the position assumed by them that the first section of the fourth article of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof," and the act of Congress of the 26th of May, 1790, passed in pursuance thereof, which provides among other things that "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken," and that therefore the record of this judgment is now entitled to the same faith and credit, force and effect, in this State which it now has in the State of Massachusetts. But we must observe in the first place that there was no objection taken to the jurisdiction of the court which had rendered the judgment then under consideration in the case of *Mill v. Duryea* in any form whatever; and although the language employed by *Story, J.*, in announcing the opinion of the court

in that case may seem at first view broad enough to meet and obviate an objection even on that ground, yet it is now well and definitely settled by repeated decisions since, and by some of a very recent date, whatever may have been at one time the impressions to the contrary, that the court which rendered the judgment in another State must have had jurisdiction of the subject-matter of the suit or the cause of action and of the parties to it, and particularly of the defendants, and when it assumes the character of an action or proceeding *in rem* that it had jurisdiction of the *res* or thing itself, or it is not conclusive or entitled to full faith and credit as a judgment beyond the limits of the State in which it was given. And Justice Story himself was particular to qualify the general terms employed by him in the case referred to both in his Commentaries on the Constitution of the United States and in his Conflict of Laws in almost the same identical words, for in each he says the judgment of another State is put upon the footing of a domestic judgment. "But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was given to pronounce it, or the right of the State itself to exercise authority over the persons or the subject-matter. The constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction of persons and things within the territory." 3 *Story on Cons.*, sec. 1307; *Story's Conflict of Laws*, sec. 609. *Kent* also observes, "the doctrine in *Mills v. Duryea* is to be taken with the qualifications that in all instances the jurisdiction of the court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the court had no jurisdiction over his person. It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit; and if the suit in another State was commenced by the attachment of property the defendant may plead in bar that no process was served on him, and that he never appeared either in person or by attorney." 1 *Kent's Com.* 261 *n. c.*

Since the publication of these works the principle as stated in them has been repeatedly recognized and is now well settled by

numerous decisions in the Supreme Court of the United States, the latest being of a very recent date. In *Mahew v. Thatcher*, 6 *Wheat.* 129, it was held that the record of a judgment in a State court is conclusive, although it appears that the suit was commenced by attachment when the defendant appeared and made defense. And in *Hollingsworth v. Barbour*, 4 *Pet.* 466, it was ruled that by the general law of the land no court is authorized to render a judgment or decree against any one or his estate, until after due notice by service of process to appear and defend. Again, it has been ruled in that court that jurisdiction is acquired in one of two modes, first, as against the person of the defendant by service of process upon him, or secondly, by a procedure against the property of the defendant within the jurisdiction of the court; and that in the latter case the defendant is not personally bound by the judgment beyond the property in question. *Boswell's Lessee v. Otis et al.*, 9 *How.* 336. Under a statute of New York which provided that where joint debtors were sued and one of them was brought into court on process, if judgment should be rendered for the plaintiff he should have judgment and execution not only against the party brought into court, but also against the other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process, but that it should not be lawful to issue or execute any such execution against the body or the sole property of any person not brought into court, a judgment was recovered against two partners, one of whom resided in Louisiana and had not been served with process in the action, and upon that judgment suit was brought against him in Louisiana, to which a peremptory exception was taken in the nature of a demurrer that the judgment sued upon was not one upon which suit could be brought against him in that court, and which was sustained by the court on the ground that Congress did not intend by the Act of 1790 to declare that a judgment rendered in one State against the person of a citizen of another, who had not been served with process or voluntarily made defense against it, should have such faith and credit in every other State as it had in the courts of the State in which it was rendered. *D'Arcy v. Ketchum et al.*, 11 *How.* 165.

It has since, however, and but very recently, been more broadly and distinctly ruled by the unanimous opinion of the Supreme Court of the United States that neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; that the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that they did exist; and that want of jurisdiction may be shown either as to the subject-matter or the person or in proceedings *in rem* as to the *res* or thing. *Thompson v. Whitman*, 18 Wall. 457. And the decision in that case was approved and affirmed by the unanimous opinion of the same court in the case of *Knowles v. Gaslight and Coke Company*, 19 Wall. 58, afterward heard in the same year, 1873. In the latter case the original judgment had been recovered in the Circuit Court of Cass County, Indiana, by default, the return of the sheriff to the original process in the suit being that he had served it personally on Knowles, the defendant in question, by reading the same to him on the day designated in the return, which he denied, and was prepared to prove in the action on the judgment was not true, but the evidence was rejected as inadmissible by the Circuit Court for the District of Minnesota in which the suit was brought upon it. In reversing that decision the Supreme Court says: "In our opinion the defendant had a right to show by proof that he had never been served with process, and that the Circuit Court for Cass County, Indiana, never acquired jurisdiction of his person. As this was refused him on the ground that the evidence was inadmissible the judgment must be reversed. We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the State in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the State. But in

the case of non-residents, like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears."

But it was further contended by the counsel for the plaintiffs that if the record of the judgment thus recovered in the State of Massachusetts was not conclusive in this court under the provisions of the constitution and the act of Congress, it must have the effect, at least, of a foreign judgment at common law, and be considered by this court as constituting in itself such *prima facie* evidence that the amount of it is due to the plaintiffs from the defendants, as will entitle them to recover in this action upon it; and this will require of us to consider for a few moments what faith and credit such a judgment recovered in the courts of a sister State of the American Union is entitled to in this independent of the provisions of the Constitution of the United States and the act of Congress, or any statute of this State on the subject, or, in other words, according to the general and fundamental principle recognized and established at common law on the subject. This rule is familiar, and has long been well settled, both in this country and in England, whence flows the common law as from its natural and original fountain, and which is clearly recognized and acknowledged so far as this country is concerned in all the cases which we have before cited; but as it has within the last few years received particular consideration and further confirmation in that country on a somewhat peculiar occasion, we will content ourselves with referring merely to the two latest cases decided in that country on the simple question presented in the case now before us, and which, though they arose as separate and distinct cases between different parties and on different days, were considered together and decided at the same time in the Court of Queen's Bench in the year 1870, and in each of which the action and the declaration was on a foreign judgment *in personam* recovered in a French court having jurisdiction of the cause of action and the parties according to the laws of France, but not of the defendants in either case according to the laws of England.

In the first of the cases referred to it not only appeared by the

record of the French judgment that the defendants were residing in England when the suit was commenced and had never been served with process in the action, but that they had afterward voluntarily appeared and been heard in it before the judgment was pronounced. The original action was on a contract made in England, and the defense to the suit upon the judgment in the court of that country was that the French court had erred in its construction of the contract according to the laws of England, and which the Court of Queen's Bench conceded, but held, and so ruled, that it was no bar to an action on a judgment *in personam* of a foreign court having jurisdiction *over the parties and the cause of action*, that the foreign tribunal had put a construction erroneous according to English law on an English contract. And in the opinion delivered in the case the court says: "It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries unless where there are reciprocal treaties to that effect. But in England and in those States which are governed by the common law such judgments are enforced, not by virtue of any treaty nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams v. Jones*, 13 M. & W. 633, that where a court of competent jurisdiction has adjudicated a certain sum of be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that judgments of foreign and colonial courts are supported and enforced. And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defense to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable." *Godard and another v. Gray and another*, *Law Reps.* 6 Q. B. 137.

In the other case the action, declaration and judgment sued on were similar to the former, and the judgment was also recovered in a French court, but, unlike the other, was obtained by default of appearance on their part against the defendants. The parties were all Danes, the plaintiff domiciled and engaged in business as a trader in France, and the defendants in England, where the contract sued upon seems to have been made. Among other pleas to the action in the case was the following; that it was commenced according to the laws then and still in force in France, by process and summons, and that the defendants were not, nor were any of them, at the time of the commencement thereof, or at any time previous to the recovery of the judgment, resident or domiciled within the jurisdiction of the court, nor were the defendants, or any of them, natives of the Empire of France, and that they were not at any time before the recovery of the judgment served with any process or summons in the action, nor did the defendants appear in the action, nor had they before the recovery of the judgment any notice or knowledge of any process or summons, or of any proceedings in the action, or any opportunity of defending themselves therein. At the trial of the case before Blackburn, J., it was proved by the evidence of a French avocat that by the law of France a French subject may sue a foreigner, though not resident in France, and for that purpose an alien, if resident in France, was considered by the French law as a French subject. The mode of citation in such a case, according to the French law, was by serving the summons on the procureur imperial. If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still, at any time within two months after judgment, appear and be heard on its merits. After that lapse of time the judgment is final and conclusive. The practice of the imperial government was in such a case to forward the summons thus served to the consulate of the country where the defendant was resident, with directions to intimate the summons, if practicable, to the defendant; this, however, was not required by the French law, but was simply done by the government voluntarily from a regard to fair dealing. It was also proved, and the jury found by their verdict, that the defendants,

who resided and were engaged in business in London, had notice and knowledge of the summons and the pendency of the proceedings in time to have appeared and defended the action in the French court. The following admissions were made by the counsel in the case: that the judgment was regular according to French law; that it was given in favor of the plaintiff, a foreigner domiciled in France, against the defendants, domiciled in England, and in no sense French subjects, and having no property in France. The judge held that, subject to the plea stated, the plaintiff was entitled to the verdict, but reserved the point, and on the hearing of the question the Court of Queen's Bench again ruled, as in the preceding case of *Godard v. Gray*, that the true principle on which the judgment of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smith*, 9 M. & W. 819, and repeated by him in *Williams v. Jones*, 13 M. & W. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in England are bound to enforce; and consequently that anything which negatives that duty or forms a legal excuse for not performing it is a defense to the action; and after adverting very fully to the argument and suggestions of counsel concluded their opinion with the remark, "We think and this all we need decide, that there existed nothing in the present case imposing on the defendants any duty to obey the judgment of the French tribunal," and accordingly the rule which had been obtained to show cause wherefore the verdict should not be altered for the defendants in the case was made absolute. The syllabus of the case is, "A judgment of a foreign court, obtained in default of appearance against a defendant, cannot be enforced in an English court where the defendant at the time the suit was commenced was not a subject of nor resident in the country in which the judgment was obtained: for there existed nothing imposing on the defendant any duty to obey the judgment." *Schibsby v. Westenholz and others*, Law Reps. 6 Q. B. 154. In the latter case the court in announcing its opinion refers to the rule of the courts of the United States on the subject, and where it states the law as to the enforcing foreign judgments to be the same as in England.

We are, therefore, of the opinion that neither under the provision of the Constitution of the United States and the act of Congress on the subject as now construed and interpreted on the authority of the cases first cited, nor at common law, are the plaintiffs entitled to maintain this action; and accordingly judgment must be entered for the defendants on the demurrer.

GEORGE S. HOLLISTER *v.* ROBERT L. ARMSTRONG, late Sheriff.

In the authentication of the copy of a deed for a farm in another State, under the act of Congress, the certificate of the presiding judge of the county subscribed to that of the clerk of the county who furnishes the copy with his seal of office affixed to it, should state unequivocally, in effect at least, that the certificate of such clerk is in due form and by the proper officer, as required by the words of the act; and therefore his statement merely that the copy is duly and properly authenticated in due form of law is not sufficient to make it evidence under the act.

ACTION of replevin for the furniture of a hotel. The defense was a plea of property in the alleged firm of Deal & Horner, who had rented the hotel and purchased the furniture on credit of Mrs. Ann Jefferson, and had left the State without paying her for it, and a foreign attachment laid upon it at her suit by the defendant. The plaintiff claimed to be the rightful owner of it by a *bona fide* purchase of it and a lease of the hotel before they left the State and the issuing of the attachment, from Horner who had previously bought out the interest of Deal, his partner, in the lease and furniture; and the consideration alleged to have been paid for it by him was the sale and conveyance of a farm in Delaware County, in the State of New York, to Horner, and which he accepted in full payment for the lease and furniture; and a certified copy of the deed from that State and county was offered in evidence to prove the sale and conveyance of the farm to him by the plaintiff.

Gray, for the defendant: Objected, because it had not been

authenticated in conformity with the act of Congress. The certificate of the presiding judge of that county, which is appended to it and which follows that of the clerk of the county, as he signs himself, and who furnished the copy from the original record of the deed there, omits to state that the foregoing certificate of the clerk was in due form and by the proper officer, or anything to that effect. In the authentication of a copy of a deed from one State to another this was a matter of substance and an essential requirement of the act of Congress.

Bradford (*Spruance* with him), for the plaintiff: There is nothing in the act of Congress which requires that the certificate of the presiding judge should so state in *ipsissimis verbis*, but a statement in any terms equivalent to it is sufficient, such as, for instance, that the certificate of the clerk furnishing it was in due form of law, and which would, of course, import in such a case, in due form as required by the act of Congress. The identical words in the certificate of the judge to that effect, as we contend, are that the copy of the deed as here certified by the clerk of the county "is duly and properly authenticated in due form of law," and although this court may not positively know any of the powers, duties, or functions of the clerk of a county, and of Delaware County in particular, in the State of New York, will it not assume from this statement of the presiding judge of that county that the copy of the deed in question and certified by the clerk of the county is duly and properly authenticated in due form of law, as a matter of reasonable judicial inference merely in such a case, that he was as such county clerk the proper and lawful keeper and custodian for the time being of the original record of it in that county? *Reagan v. McCormick*, 4 Harr. 435; *Taylor v. Carpenter*, 2 Wood and Minn. 1.

Gray: The words of the act of Congress and the requirement are that the presiding judge shall certify that the copy "is in due form and by the proper officer," but the certificate of the presiding judge in this case complies with the first branch of the requirement, that is to say, that it is properly authenticated in

due form of law; but the second branch of the requirement is equally important, substantial, and indispensable, and even more so, for it goes beyond matter of form merely, and that is, that it was also by the proper officer.

The Court: The copy of such an indenture or record in another State can only be given in evidence in our courts as an exemplified copy of the original under the act of Congress. In this case the certificate of the clerk of the county was drawn, as it should have been, according to the usual form followed in that State, for the act of Congress does not prescribe any form for such a certificate, but it does prescribe in express terms, and we think imperatively requires, that the certificate of the presiding justice of the county afterward to be affixed to it, should state in addition to its being in due form that the certificate of the clerk was by the proper officer, we will not say in so many identical words, but to that effect unequivocally and without any doubt or uncertainty as to the meaning and sufficiency of the terms employed for that purpose. If his statement had been either in terms or in effect certainly that it was in due form and by the proper officer, which are the words of the act, they would have necessarily imported in this case that the clerk of the county who furnished the copy and affixed his seal of office to it was the lawful keeper of the original and public record of the deed in question, for the act of Congress expressly provides that the lawful keeper of such a record or office paper shall be the proper officer to furnish the copy, append in the first place his official certificate and affix the seal of his office to it, and that then the presiding judge shall add his certificate that the preceding or first certificate is in due form and by the proper officer, or, in other words, by the lawful keeper and custodian of the original record. This is not stated nor necessarily implied, we think, in the certificate of the presiding judge in the authentication of the deed in this case, and we must, therefore, exclude it. There is a marked difference in the provisions of the acts in relation to the authentication of a deed or an office paper like this, and of a judgment or decree or proceeding of a court of record in another State, the latter containing no such requirement as the former in this respect.

The case afterward went to the jury, and after a charge on the facts proved the plaintiff had a verdict.

Cooper, J. B. Rodney, and Gray, for the plaintiff.

Bradford and Spruance, for the defendant.

THE KENT COUNTY RAILROAD COMPANY v. WILLIAM WILSON.

Fraud practiced in the inception of a contract renders it void; it is, however, never to be presumed, but must be clearly proved. Actual or positive fraud is any false representation, deceit, device, or artifice resorted to or used with intent and for the purpose of deceiving or misleading another to his injury, and may be proved either directly or inferentially, as any other fact.

The fraud meant or signified by the plea of fraud and covin is not merely legal, but it is moral fraud as well, practiced on the other party with intent to deceive or mislead him in respect to the very transaction and subject of controversy between the parties. It consists in a false representation or concealment of material facts with intent to deceive, although knowledge or information of the matter be not exclusively within the reach of the party misrepresenting or concealing it.

A representation, however, though false, will not vitiate a contract unless it be fraudulent also and operates as an inducement influencing the other party to enter into the contract. And it may be laid down as a rule of universal application and acceptance that a collateral statement made at the time of entering into a written contract, but not embodied in it, to invalidate it on the ground of its being a fraudulent statement, must be shown to have been not only false, but that it was known to be false by the party when he made it, and that the other party was thereby induced to enter into the contract.

An assurance given by the agent of the commissioners of a railroad company to procure subscriptions to the stock, to a subscriber at the time of his subscribing to it that if he would do so, the railroad of the company would be located and constructed by a route specifically designated by him, and on the faith of which he subscribed for one hundred shares of the stock, but which assurance was not embodied in the contract of subscription, was a collateral statement, and if the agent at the time he made it knew it to be untrue, and made it with the fraudulent intent to mislead and deceive the subscriber, it would amount to a fraud which will vitiate and avoid his contract of subscription.

If by the terms of the charter of the company and the contract of subscrip-

tion, and the contract of subscription is in writing under the hand of the subscriber, the stock is to be paid for in such manner and proportion and at such times as shall be determined by the president and directors of the company and in such installments as they shall require, provided that no payment shall be demanded until at least thirty days' public notice shall have been given in at least one newspaper published in the county in which such payment shall be demanded, and the payment of it is so called for, and published in five successive installments, the six years' bar of the statute of limitations will not begin to run against the claim of the company from the date of the contract of subscription, as in the case of a promissory note payable on demand, but from the time when the cause of action accrued, which was not until it became payable according to the calls for the installments and the thirty days' publication of them; and if they had been even so barred, the payment of the first within the six years would have taken the claim for the balance out of the operation of the statute.

THIS was an action of *assumpsit* by The Kent County Railroad Company against William Wilson for the balance remaining unpaid on his subscription to the stock of it amounting to twenty-three hundred and seventy-five dollars. The pleas were *non assumpsit*; the act of limitations; and that the defendant signed the alleged subscription to the stock of the company upon the express assurance given at the time by the agent of the company who took it, that the route of the railroad when located should pass through or near Warwick, in the State of Maryland, and terminate at Middletown, in the State of Delaware, but that it was not so located, etc. And on which issue had been taken as well as on the other pleas.

Massey, for the plaintiff: After the case had been called, but before the drawing of the jury was commenced, submitted a motion to the court to strike out this plea. It was immaterial, wholly so, and presented neither in form or substance any issue or question of fraud in the case, for it does not even aver that the alleged representation or assurance given him was falsely, much less fraudulently made. Besides, the subscription to the stock and the promise of the defendant to pay for it is in writing and unconditional, while the plea seeks to qualify and vary it by verbal conditions merely, which is wholly inadmissible in evidence under that or any other plea. But in addition to that it was well settled that no change in the route

of a railroad sanctioned by a majority of the stockholders of the company after a subscription to the stock of it had been made, will absolve or discharge the subscriber from his legal obligation and liability to pay it. *Del. R. R. Co. v. Tharp*, 1 *Houst.* 149; *Redf. on Railw.*, sec. 5; *Pierce on Amer. Railr. Law*, 70.

G. B. Rodney, for the defendant: The motion to strike out the plea had come at a very late moment. The plaintiff had taken issue upon it, and the case had stood for trial on that and the other issues joined during the whole of the term and until this late period of it; and the defendant had been here and was still here prepared to try it on that and the other issues. He would, however, ask for leave to withdraw the plea and to enter in lieu of it the general plea of fraud and covin, which the court, with the consent of the other side granted.

The subscription of the defendant was for one hundred shares of the capital stock of the company at twenty-five dollars per share, and it was made or purported upon the stock subscription book to have been made according to the date of it on the 12th day of December, 1865, although according to the proof of the witnesses on that point it was not actually made until the month of July, 1866. The company had been originally incorporated by the legislature of the State of Maryland to construct a railroad through Kent County in that State from the waters of Chesapeake Bay or some point on Chester River to the boundary line of the State of Delaware, and afterward by the legislature of the latter State to extend the construction of it within the limits of the latter so as to connect it with the Delaware Railroad at some point on the line of it not more than four miles from the place called Townsend. The defendant was one of the subscribers who desired to have the road located through Warwick or near it in that county to Middletown on the line of the Delaware Railroad in this State, and the agent of the commissioners of the company who procured his subscription to the stock assured him and others at the time that if they would subscribe to the stock the railroad should be so located and constructed. It was not, however, so located and constructed afterward by the directors of the company, but was located and

constructed from its terminus on Chester River toward Warwick and Middletown to Massey's Cross Roads, in Kent County, Maryland, several miles distant even from Warwick, and from Massey's Cross Roads the Delaware Railroad Company, with the understanding and consent of the plaintiffs, constructed a branch railroad to Townsend, on the Delaware Railroad, so as to connect it with that railroad at that place.

The first installment called for on the subscription to the stock, amounting to one hundred and twenty-five dollars, on the defendant's subscription, was duly made and advertised, and was paid by him on the 13th day of May, 1867, and the balance of it was duly called for in four subsequent installments made and advertised in like manner; the second to be paid August 15th, 1867; the third, May 20th, 1868; the fourth, September 1st, 1868; and the fifth, on September 1st, 1869, but none of which had been paid by him. By the written terms of the subscriptions they were to be paid respectively in such manner and proportions and at such times as should be determined by the president and directors of the said company in pursuance of their act of incorporation. And this action, against the defendant was instituted on the 10th day of May 1873.

Massey, for the plaintiffs: Fraud is never to be presumed but must be proved to constitute a defense in any case. But the authority of Mr. Fennimore as the agent of the commissioners to obtain subscriptions to the stock of the company, to give any assurance, or make any declarations as to where the projected railroad would be located and constructed, even if they had been both false and fraudulent, which no one preterds to say, must be proved to bind the company, and yet the utter impossibility that there could have been any such authority given is obvious when we consider and reflect that the whole board of commissioners collectively had no power whatever to locate the road or to indicate where the line or route of it was to be; for that was a function afterward to be devolved upon and to be performed by the president and directors of the company after it had been fully organized

J. A. Rodney, for the defendant: When the stock subscriber is misled in a material respect at the time of making the subscription, it will not bind him. *Redj. on Railw.* 70; 26 *Penn.* 71; *U. S. Dig.* 634; 17 *Texas* 560. As to the plea of the statute of limitations, we consider and contend that the subscription of the defendant became due and payable as soon as the company was organized, for the president and directors then had authority at any time to demand it, and as fast as they might choose to call for it, for it has been ruled that a note payable as the payee may require it, is payable on demand, and the statute begins to run against a note payable on demand from its date. 9 *Johns.* 218.

G. B. Rodney, for the defendant: This, to say the least of it, was a case of very peculiar and aggravated hardship upon the defendant and several other subscribers then and still residing in this State, like him. For it was not until after this Maryland company had come into this State and obtained a charter to extend and build their railroad within our limits as expressly indicated and designated in it, and after, too, the explicit assurance had been given them by the authorized agent of the company that it would certainly be located and constructed through or near Warwick to Middletown, in this State, that his and their subscriptions were made to the stock; for without the extension into this State by that route, and built as it has since been far away from it and from their lands and possessions in this State, they have, and never can have, any interest whatever in it; and the failure of the company to do that and to redeem that assurance, attended, as it has been, with such serious consequences to these subscribers, and the total failure of the consideration for the subscription and promise to take and pay for the stock, would justly and lawfully absolve the defendant and every other subscriber like him from any liability now to pay for it. Such a false and deceptive assurance or misrepresentation as that by any agent, although not fraudulently made by him, will vitiate any subscription for which it constituted the sole inducement in the mind of the other party. *Add. on Contr.* 631; 3 *Campb.* 506; 4 *Metc.* 151. In this case the representa-

tion of the agent was not collateral to, but it was inherent in the contract itself, was made before it was entered into, and constituted the sole consideration for the defendant's entering into it. The charter authorized the company to call for and require the subscriptions to be paid as soon as it was organized, and they might have been called for in two installments instead of five, to be paid in one and the same week, on thirty days' notice published as required by it. The subscription was, therefore, payable on demand the moment the company was organized, but in not less than two installments or on less than thirty days' advertised notice as to each, and being so the six years' limitation of the statute cannot properly apply to it, but only that which applies to a debt payable on demand at any time after thirty days' notice given of it.

Gray, for the defendant: The cases on this question of fraud are multitudinous, but the principle ruled in all of them may be extracted from a comparatively few leading cases on the subject; and that is that actual fraud which goes to the root and foundation of the contract must be proved in order to vitiate and avoid it. 10 M. & W. 146; 1 *Smith's Ld. Ca.* 238; *Benj. on Sales* 389. The charter of the company clothed the commissioners with the power merely to open the books and to take subscriptions to the stock, and every subscriber, as well as Mr. Pennimore, must have known that they had nothing to do with the location of the road, and no power or authority whatever over it. It may have been, and doubtless was, the hope and confident expectation of many of them, and of all who subscribed on that ground, as the defendant did, that it would be located as he represented, but at the same time they must have known that it was but a matter of hope and expectation dependent entirely upon the determination of others who were to come after the commissioners, the president, and directors of the company. As to the plea of the statute, he would simply remark that both by the terms of the charter and of the subscriptions to the stock of the company, no part, no installment, of any one of them could by law become due and payable, or could be sued for until after it had been duly called for and

duly advertised for thirty days, as provided for in the charter, and, of course, the statute of limitations can never begin to run until the cause of action has accrued in any case, and the promise being in writing under the hand of the party to pay when and as it should be so called for and demanded, the limitation of six years applies to this case.

The Court, Gilpin, C. J., charged the jury: The subscription of the defendant under his hand for one hundred shares of stock in the company, at the price of twenty-five dollars per share, amounting to two thousand five hundred dollars, in the month of July, 1866, had been proved as alleged by plaintiffs and is not denied, and the payment of the first call upon it, amounting to one hundred and twenty-five dollars, by the defendant, on the 13th day of May, 1867, has also been proved and is not disputed. The suit is for the balance, two thousand three hundred and seventy-five dollars, and was instituted on the 10th day of May, 1873. And this would entitle the plaintiffs to recover it unless the defendant has clearly shown to the satisfaction of the jury by the evidence in the case, either that the contract of subscription to the stock was rendered void and of no effect by reason of false and fraudulent representations and assurances made to him by the agent of the commissioners, Mr. Fennimore, appointed to procure subscriptions to the stock of the company, at the time or immediately before he subscribed to the stock, or that the claim has been barred by lapse or efflux of time since it was made under the statute of limitations.

Now, as to the plea of fraud and covin, I remark in the first place that fraud practiced in the inception of a contract renders it void. That is to say, if the transaction be tainted with fraud it is no contract, and consequently it imposes no obligation on the person entering into it. But I must also remark to you in very emphatic terms that fraud is never to be presumed; on the contrary, it must be clearly proved by the evidence to make it available as a defense. Now, I may say that actual or positive fraud may be defined or described to be any false representation, deceit, device, or artifice resorted to or used by one person with the intent and for the purpose of deceiving and misleading

another person to his injury. This is the best general definition which I can give of what is meant by fraud. It is comprehensive in its terms, and it is true as well in its moral as in its legal aspect. It may be proved either directly or inferentially as any other fact is proved. I have said it must be clearly proved in order to constitute a valid defence, for it must be borne in mind that where the circumstances relied upon as indicating fraud are of a doubtful nature, or are susceptible of an innocent interpretation, or are calculated to raise but a bare suspicion of fraud in regard to the person charged therewith, they will not amount to sufficient evidence to establish the fact.

Fraud as meant and signified by the plea of "fraud and covin," is not merely legal, but is moral fraud as well, practiced on the defendant by the plaintiff or its authorized agent, or by the railroad commissioners in this case or their agent, with the intent to deceive and mislead him in respect to the very transaction in question and which is the subject of controversy between the parties. It means more than a mere false statement ignorantly or erroneously made under a misapprehension and without any intention or design to deceive. It consists in a false representation or concealment of material facts with intent to deceive. Fraud occurs where one party substantially misrepresents a material fact peculiarly within his own knowledge, in consequence of which a delusion is created, or makes a statement which he knows to be untrue, and which is naturally calculated to lull the suspicion of a careful man and induce him to forego inquiry into a matter upon which the other party had knowledge or information, although such information may not be exclusively within his own reach. But a representation, though false, will not vitiate a contract unless it be fraudulent also, and operates as an inducement influencing the party to enter into it. The misrepresentation of a fact, however, known to the party making it to be untrue, amounts to a fraud in law if the representation be naturally calculated or be expressly intended to induce a person to act upon it, so that he may thereby be prejudiced or injured. And it may be laid down as a general rule established and sustained by the highest authority, and of universal application and acceptance in the courts of England, as

well as of this country, that a collateral statement in a case like this made at the time of entering into the contract, but not embodied in it, must, in order to invalidate the contract on the ground of its being a fraudulent statement, be shown not only to have been false but to have been known to be so by the party making it when he made it, and that the other party was thereby induced to enter into the contract. The representation in this case was a collateral statement, not embodied in the contract, but extrinsic to it, and it seems to me that the rule which I have just stated applies with singular significance and force to the case now before this court and upon which you are now called upon to pass and determine by your verdict. *Comfool v. Fowke*, 6 M. & W. 358; *Moens v. Hayworth*, 10 M. & W. 147; *Stevens v. Webb*, 7 C. & P. 60; *Flinn v. Tobin*, M. & W. 367; *Exerly v. Garrett*, 9 B. & C. 928; *Palhill v. Walter*, 3 B. & A. 114; *Freeman v. Baker*, 5 B. & Ad. 797; *Heely v. Lock*, 8 C. & P. 527; *Mears & Son v. Waples*, 3 Houst. 581. The question is whether Mr. Fennimore at the time when he made the statement knew it to be untrue, and made it with the fraudulent intent to mislead and deceive the defendant? If he did, then your verdict should be for the defendant. But if he believed at the time that the statement he made to the defendant was true, or did not know that it was false, and did not make it fraudulently or with the intention or design of misleading or deceiving the defendant, and thus inducing him to enter into the contract of subscription, then your verdict under the plea of fraud and covin should be in favor of the plaintiff.

In regard to the plea of the act of limitations it is proper I should say to you that as the contract is in writing, under the hand of the defendant, the claim is not barred until after the expiration of six years from the time of the accruing of the cause of action. It has been insisted by the learned counsel for the defendant that this contract of subscription is in point of law analogous to, and in effect the same as, a promissory note payable on demand, and that the statute of limitations began to run against the claim from the date of the subscription or the day on which it was made, and if six years had elapsed between that day and the day on which the action was commenced, the

plaintiff must fail to recover by reason of the bar of the statute. But the contract of subscription in this case is not like a promissory note payable on demand, for when it was entered into the company was not yet organized and there was no person legally authorized to receive the money. Moreover, by the terms of the charter, the company had no power or authority when organized to require immediate payment of the subscription. The charter prescribes in express terms the form of the contract of subscription; and according to it the subscribers to the stock contracted to pay for it "in such manner and proportion, and at such times, as shall be determined by the president and directors of the company," whilst the eighth section of it prescribes that upon every such subscription there shall be paid to the person or persons appointed to receive the same, such installments as the president and directors of the company shall require, provided that no payment shall be demanded until at least thirty days' public notice shall have been given in at least one newspaper published in the county in which the payments shall be demanded. From all of which it clearly appears that the subscriptions were not to be paid immediately, but were to be paid in partial payments or installments from time to time as they should be called for by the president and directors, and then not until thirty days after the call should have been published, as required by the terms of the charter. We therefore instruct you that the bar of the act of limitations did not begin to run in this case, until after the time when the several installments became payable according to the terms of the published notices which are in evidence before you. And if you are satisfied from the evidence that the several installments were made payable at the several times mentioned in the published notices of the calls in evidence before you, then we say to you that the claim of the plaintiff is not barred by the act of limitations, because this suit was commenced for the recovery of it within six years from the accruing of the cause of action upon it. And moreover, we say to you that if you are satisfied from the proof in the case that the first installment of one hundred and twenty-five dollars was paid by the defendant on the 13th day of May, 1867, then the payment of that

installment at that time took the case out of the operation of the act of limitations from that time, as an acknowledgment of his subsisting liability to pay the subscription, and that the plaintiff would, therefore, have six years afterward from that date within which to commence its action for the recovery of the balance of the subscription remaining due and unpaid on the subsequent installments according to the published calls in evidence before you, this suit having been brought, as before stated to you, on the 10th day of May, 1873.

The plaintiff had a verdict.

COURT OF ERRORS AND APPEALS.

JUNE TERM.

1875.

GEORGE F. BRADY, HENRY BRADY, SAMUEL BRADY, and WILLIAM BRADY, trading as GEORGE F. BRADY & Co., defendants below, plaintiffs in error, *v.* WILLIAM H. JEFFERSON, trading as E. JEFFERSON & SON, plaintiff below, defendant in error.

The owners of a steam-tug, who have the exclusive right and privilege by agreement with the canal company of towing vessels and canal-boats or barges by steam-tugs or by mules or horses, on the Chesapeake and Delaware Canal, with a number of barges in tow in a single line astern of it in the canal, is liable to the owner of a cargo of Indian corn on board a sloop at the same time being towed by them with mules through it in the opposite direction, for a collision of one of the barges with it, by which it was sunk and the corn greatly damaged, if the evidence shows a want of special care, diligence and skill on the part of their commander of the steam-tug on the occasion, and no contributory negligence appears on the part of the commander of the sloop, notwithstanding the evidence also showed that the owners of the barge had their own crew on board of it, whose duty it was to attend to the steering of it and to keep it in the wake of the steam-tug and in the line of the rest of the tow behind her, but not one of whom was above the deck or at the helm of it when the collision occurred.

THIS case came up in the Court of Errors and Appeals on a writ of error and bill of exceptions filed to the Superior Court for New Castle County, and was heard before Saulsbury, Chancellor, Gilpin, Chief Justice, Wootten, Houston, and Wales, Associate Judges, in which the case was tried before Wootten and Houston, Judges, in the absence of Gilpin, Chief Justice, in the court below.

The case below was an action on the case for negligence in the steering and management of a line of four barges in tow of a steam-tug belonging to the plaintiffs in error on the Chesapeake and Delaware Canal, in consequence of which the last, or last but one, of the barges in the line came in collision with a sloop laden with a cargo of Indian corn belonging to the defendants in error and sunk her and her cargo in the canal. On the trial the plaintiffs below, defendants in error, had a verdict for the damages sustained, and upon a bill of exceptions filed by the plaintiffs in error, defendants below, to the charge of the court to the jury on the facts proved, the writ of error was taken to this court. *Vide Jefferson v. Brady & Co.*, 4 *Houst.* 626.

The grounds of error assigned were that on the trial of the case below the defendants in the action proved by several witnesses of long experience in and full knowledge of the mode of conducting the business of towing barges and vessels through the Chesapeake and Delaware Canal, and of navigating the same, and of the usages and customs connected therewith, that barges and other vessels entering it and taking steam or mule or horse towage always continued in the custody, possession, and management of their respective crews, whose invariable duty it was to steer such barge or vessel whilst being towed through it whether by steam power or by mules or horses, and keep watch over the same to avoid collision with other barges and vessels, for which they were paid as a part of their usual employment by the owner or owners of such barge or vessel, and who were not paid, appointed, or discharged by the proprietors or the officers of the tug-boat engaged in towing it; and that whilst a steam-tug having a line of barges in tow has control over them, so far as going ahead or slackening speed is concerned, it is at all times in the power of the helmsman of any barge or vessel whilst being towed to steer it in such a manner as to collide with another in meeting and passing it, and that such a collision may be produced by his steering such barge or vessel willfully, or by his neglecting to steer it properly on such an occasion. That every such barge or vessel is usually and should always be provided with a horn to signal the steam-tug to stop or move as the occasion may require, and that it is the

duty of the persons in charge of the tug to heed and obey such signal by horn or by passing the word along from barge to barge or vessel to vessel in tow from it; but the steam-tug otherwise always dictates and regulates her own speed and the speed of the barges or vessels in tow, subject to the rules and regulations of the canal company. No sudden instance, however, of careless or intentional bad steering of a barge or vessel in tow and under way can be immediately checked or remedied by anything which can be done by or on board of the steam-tug.

That the steam-tug on the occasion in question was in command of a licensed first-class pilot and an experienced commander of steamboats, and that it was well found and fitted for its work, and that the engineer and fireman of it were also experienced and competent men in their respective capacities; that it had in tow in the canal four empty barges in a line astern of it attached to it and to each other by tow lines the usual distances apart, each having on board its usual and proper crew, when it met the sloop a few hundred yards on the easterly side of the bridge of the Delaware Railroad Company over the canal, and that when the tug was about three hundred yards from the bridge and approaching it, the commander, who was then at the wheel of it, rang "one bell," the signal to slacken the speed of it, and was at that instant apprised by the engineer that the two rear barges in tow were not steering properly, and immediately blew the steam whistle of it three times, which was the signal to call the attention of the several crews forthwith to the proper steering of their respective barges, which they heard, but the steam escaping and the smoke blowing from the smoke stack of the tug between his position on the forward part of the tug and the barges behind it, he did not see or know of the collision, but then, receiving a signal from the barges that all was right, he went ahead. The sloop, however, was in motion all the time he saw her. The engineer corroborated the testimony of the captain of the tug, and added that he was so situated that he distinctly saw the collision, and that it was between the sloop and the fourth or last barge in the line, and was caused by the barge not being properly steered and by the sloop not being properly tied up to the tow-path whilst the tug and its tow

were meeting and passing it, and it was consequently allowed to sheer out into the canal and strike the barge, but that nothing could have been done on board of the tug which could have prevented it. And further, that the barges were fastened in tow of the tug as follows: The first barge by two lines to the tug and about twenty feet astern of it, the second barge by one line to the first and ten or twelve feet astern of it, the third barge in like manner to the second and ten or twelve feet astern of it, and the fourth in like manner to the third and the like distance astern of it, none but the first being directly attached to the tug. And further to maintain the issue on their side, the said defendants below proved and offered in evidence before the jury the printed regulations of the canal company required to be observed by all vessels navigating the canal and which were then set forth at full length, one of which was that steamboats shall always give the inner track or the side of the canal next to the tow-path to vessels and boats in tow of horses. By the agreement of counsel the statement of the facts of this case, as reported in *Jefferson v. Brady & Co.*, 4 *Houst.* 627, 8, 9, was to be read as part of the bill of exceptions at the hearing of this cause, and which was as follows:

Action on the case for damage to a cargo of Indian corn belonging to the plaintiff sunk in a sloop by collision with a barge in tow of a steam tug-boat of the defendants on the Chesapeake and Delaware Canal in the month of March, 1873, before Wootten and Houston, Judges, Gilpin, C. J., absent. The defendants had by contract with the canal company the exclusive right and privilege of towing all vessels on the canal both by steam-tugs and by horses or mules, except such as were propelled by steam or were provided with horses or mules of their own to tow them. At the time of the collision, the sloop with the cargo of corn on board, consisting of about sixteen hundred bushels, was proceeding, drawn by a mule team belonging to the defendants and a driver of it in their employ, from Bohemia on the canal eastward through it to New Castle, when on rounding the curve to the west of and near the Delaware Railroad bridge, and when within a hundred yards of it on the western side, the steam-tug was suddenly discovered to be approaching it at full speed

from the opposite direction and only five or six hundred yards from it, but not in time for the sloop to be stopped before running into the bridge had the attempt been made to do it; and accordingly, the proper signal having been promptly given on board of the sloop for the removal of the draw of the bridge, which is not of sufficient width to admit two vessels abreast into it, and which was as promptly done by the keeper of it, the sloop was immediately passed through the draw, when the order was given by the captain of her to the driver of the team to cast off the tow line, and as soon as the sloop was clear of the fenders of the draw on the other side she was sheered close in toward the bank of the canal and the tow-path, the steam-tug then being about two hundred yards from the bridge. The tug had in tow astern of her four empty barges or canal boats bound through the canal to the city of Baltimore, attached to it in a row or single line coupled together in the usual method and with the usual lengths of tow lines between them. As soon as the sloop cleared the draw of the bridge the captain of it discovered the barges in tow of the tug, and that there was no one on the deck or at the tiller of either of the third or fourth one in the line, and that they were both veering or yawing very much from the course of the tug toward his side of the canal, and to avoid a collision with them he run the sloop as hard aground as he could on his side of the canal and as close to the tow-path as practicable, about a hundred and fifty yards from the bridge. It was also observed about the same time by the captain of the tug that there was no one steering either of the two hindmost barges, and he at once gave the signal from it for the men on the barges to steer them, but before any one had appeared on deck and reached the tiller of either of them the bow of the third barge came in contact with the bow of the sloop, partly between it and the bank of the canal, carrying away the bowsprit and splitting her bows open down the stem from the deck to her keel nearly, and, dragging her round with her head toward the middle of the canal, sunk her beneath the water of it. In the meanwhile the engine of the tug had been stopped just after it had passed the sloop, which was grounded immediately afterward by the captain of it. There was a strong wind blowing at the

time from the northeast and partly across the canal and from the side of it on which the sloop was grounded. The barges in tow belonged to unknown and different persons living out of the State and were all manned by crews employed and paid by the respective owners of them.

There was considerable discrepancy and even conflict in the testimony of the witnesses, as is usually the case in collision of vessels, but the facts as above stated were substantially established without any material contrariety in the evidence adduced on behalf of the respective parties. It further appeared also in the evidence that there is what is termed by the men in the business a suction of the water produced in the canal by the passage of a steam-tug or by any other vessel drawing as much water and propelled in like manner through it, which has the effect both to lift and draw a vessel from the sides of the canal into the wake of it immediately after passing it; and so well was that fact and the force and danger of it known to men as familiar with the navigation of the canal as was the captain then in command of the sloop, that the captains of vessels towed as the sloop was when meeting a steam-tug frequently stop and make them fast with their lines to the side or bank of the canal until they pass in order to prevent and escape it, and that the most prudent captains generally adopt this precaution to avoid the danger of it when they have sufficient notice and time to do so on such occasions; also that there are snubbing posts set in the bank on that side of the canal from the bridge up to near where the sloop was grounded which afford peculiar facilities for that purpose. By the regulations of the canal company a tow drawn by horses or mules is required to keep on the side of the canal next to the bank on which the tow-path lies and as close to it as practicable, and steamboats are always required to give the inner track to such a tow.

Whereupon the said defendants by their counsel prayed the opinion and direction of the court to the jury, first, that the said steam-tug stood in the relation of a bailee for hire to the said barges and every one of them in her tow, and was to be held only to the exercise of ordinary careful management in the towing of them; second, that no increased care or responsibility

could be demanded of the tug toward other vessels or barges she might meet in the canal than was due from her toward her own tow; third, that if no negligence or omission of ordinary care and management was proven on the part of the said tug, then the tug or her owners were not responsible either to the barge or barges in her tow or to the owner of any vessel or cargo injured by a collision with any of the barges in her tow; and, fourthly, that if something was to be done by the captain and crew on any of the barges in tow of the tug, in steering, keeping watch, and obeying signals, and if there was a want of care or skill in the performance of those duties by the captain and crew of any barge to which the collision that ensued was attributable, then the tug and her owners were not responsible to those who had suffered for want of such care or skill. The charge of the court to the jury was then stated also at length in the bill of exceptions, the tenor of which will sufficiently appear for the purposes of this case and the report of it from the assignment of errors and the objections taken to it by the plaintiffs in error, which were as follows: that the court had erred in omitting to charge the jury as requested in the first, second, third, and fourth prayers in the bill of exceptions stated; fifth, in charging the jury that the defendants as owners of the said steam-tug were liable for damages caused by any collision occasioned by negligence and want of ordinary care, skill, and diligence on the part of any person whose duty it was to steer the said barges; sixth, in charging the jury that those who make it a business to tow vessels and barges through this artificial channel of navigation, hold the relation of principals to those who employ them and who are to be held as their agents, and that the law of principal and agent applies to their transactions; seventh, in charging the jury that under the rules and regulations of the canal company, the relations and liabilities of those who make it a business to tow vessels through the canal are to be fixed and settled as being those of a principal to those who employ them, and who are to be held to be their agents in such transactions; eighth, in charging the jury that the captains and crews of the said barges were the agents of the said tug-boat and her owners for the steering of them when towed by her on the canal.

Pepper, for the plaintiffs in error: We have always contended in this case that the owners of the tug were merely bailees of the barges for hire whilst engaged in towing them through the canal, and as such were only bound to exercise ordinary care and skill in towing them to avoid such a collision with any other vessel at the same time being towed upon it. They were not common carriers of the barges for hire, and were, therefore, not liable for the careful and safe towage of them to that stringent degree which the well-settled principle of law would import, if the relation of a common carrier had existed between the owners of the tug and the owners of the barges in their occupation. *Story on Bailm.*, sec. 496; *Alexander v. Green*, 3 Hill 1; *Caton v. Rumney*, 13 Wend. 387. Nor were the owners of the tug the principals, and the captain and crew of the respective barges in tow their agents or servants to steer the barges for the occasion, that is to say, in their passage through the canal in tow of the tug, for no such relation as that, either in contemplation of law or in point of fact, existed between the owners of the tug and the crews on board of the respective barges during that time, and therefore the owners of the tug were not responsible for any collision or injury which resulted solely from the negligence or the neglect of the crew on any one of the barges to attend properly to the steering of it at the time of its occurrence. *The Farragut*, 10 Wall. 336; *The Webb*, 14 Wall. 416; *The Cayuga*, 16 Wall. 177; *Sproul v. Hemmingway*, 14 Pick. 5, 6; *Lougher v. Pointer*, 12 E. C. L. R. 311; *Milligan v. Wedge*, 40 E. C. L. R. 177; *Quarman v. Bennett*, 6 M. & W. 503.

The crews on the barges were solely the agents and servants of the owners of them respectively, and were solely appointed and paid by the owners of them for the purpose of steering and running them through the canal or elsewhere under whatever kind of tow, and were solely removable from their employment as such by the owner or owners of the barge, and the latter, being their principals or masters in their business and employment of running and steering the barges, they, and not the owners of the tug, were responsible in law for any injury resulting to another from their negligence or want of reasonable care or skill in the steering and running of them wherever that might be. The

owners of the tug, even for the time being and while under tow by them, could not remove them from their employment on the barges or appoint others to take charge and command of them, and it was equally evident that practically the crew and officers on board of the tug when under way with the barges in tow astern of her could not prevent the latter from yawing, as they term it, from a direct line toward either bank of the canal, and that none but the crews on the barges could prevent it. They and their employers and principals, the owners of the barges, should therefore be held liable for such an injury as this, when it is clearly attributable to their negligence alone, as is admitted in this case.

The contract between the owners of the tug and the canal company to do the general towing on the canal upon such terms and conditions and at such rates as the company see proper to prescribe, is not a monopoly, any more than the company itself is, and, of course, it would not long continue if the company did not find their compensation, advantages, and profit in it by thus being relieved of the trouble and expense of doing the towing itself on the canal; but if it had to incur the expense of furnishing the canal with all the appliances necessary for that purpose, the teams, drivers, and tugs, so as to be ready at all times to meet the demands upon them for towing vessels through the canal, they would doubtless find it a losing business to throw it open to free competition, whilst that free competition would soon have the effect probably to render means and facilities of towing on it too precarious and uncertain to be depended on, and thus the public, as well as the company, would become the losers by it. The plaintiffs in error, therefore, were not monopolists in the business in the odious sense of that term, but had assumed an onerous and responsible duty and obligation to be prepared at all times to do all the general towing on the canal at just and reasonable rates, not dictated or fixed by themselves, but agreed on between them and the company. There was then nothing in the fact that they had such an exclusive contract to do the towing for the company which ought to render them liable for such a collision, if they would not be liable in law for it without such a contract.

Whitely, for the defendants in error: This was not only a case of first impression in this State, but elsewhere, as far as he had been able to learn, the distinction between it and all the other cases of collision referred to, consisting in the fact that all the others were on navigable rivers or in bays or harbors, in regard to which different rulings were to be found in the different States, while this occurred in an artificial channel of water communication, the Chesapeake and Delaware Canal, between an empty canal barge in tow with three others in a line astern of a steam-tug, and a sloop laden with corn towed by a team of mules proceeding in an opposite direction, both at the time in the possession, care and custody of the same towing company for the purpose of being safely towed through it, accompanied with the fact that neither of them was at liberty to employ any other person to perform that service for them, in case they were not provided with motive power of their own to perform their own towing. There was also another special fact or circumstance which should be mentioned in connection with it, and that was that each of the four barges tied together and constituting the tow of the tug belonged to different owners residing in different and remote parts of the country and beyond the limits of this State, whilst the plaintiffs in error resided almost within sight of the canal, and each barge was manned with a crew appointed and employed by the respective owners of them. The evidence in the case was clear and uncontradicted that no one was at the rudder of either the third or the fourth barge in the line, and no one was steering either of them just before and at the time when the collision occurred. The barges being thus obliged to employ the tug, and being under the command of its captain and in the possession, custody and control of the owners of it, as bailees for hire of the barges, according to the admission on the other side, for the time being, and for the purpose of being towed by them by means of their tug through the canal without damage to them, or the property of the company, or the property of any person rightfully on the canal so far as it could be avoided by the exercise of due care, skill and diligence, the law would necessarily imply that they were for the time responsible for any injury to the property of another rightfully on the canal, and particularly,

when it was at the same time and in a similar manner and for a like purpose also in their possession, care and custody as bailees for hire of it, which might result from the neglect of the crew on board of any one of the barges to attend properly to the steering of it when under way and being towed by the tug, and particularly, while meeting and passing another vessel in such a channel, and where such a mode of navigating it by steam-tugs with long lines of barges towed astern of them, is peculiarly liable to produce such collisions. The crews, it is true, on board of the barges were appointed, employed and paid, and could only be discharged and removed from them, by the owners of them, for the owners of the tug or its captain, we may admit, possessed no such general power or authority over them. But it is for their interest as well as for the interest of the owners of them, and, in point of fact, it is absolutely necessary, that they should continue as crews on board of them in their passage under tow through the canal, and as such crews on board of them, it is a duty which they owe alike to the owners of them and to the owners of the tug and the captain or officer in command of it, to steer and properly attend to their barges to keep them in a proper course as much as possible while under tow; and such had been the uniform custom, practice, and understanding by all concerned in the matter ever since it was opened to this kind of navigation.

As soon as the barges are made fast to the tug and the towing is begun each captain and crew of the barges understand that to be their duty, and from that moment that they are under the command and authority and subject to the orders and directions of the tug and its captain in all that pertains to the navigation and towing of them so long as it lasts on the canal, and for that purpose established signals are given and received from the tug and are obeyed on board of the barges. And such also is the law and the regulation of the canal company on the subject, for it is one of the requirements of the owners of the tug, made, of course, with the sanction and the approval of the company whose agents and representatives they are in their business, that the captain and crew of every barge shall faithfully attend to and properly steer their barges while in tow and under way, so as to save themselves as well as other vessels from any injury or ob-

struction in the passage of the canal. And does not the fact that the barges by reason of the exclusive contract between the company and the owners of the tug for all general towing on the canal, imply or import and impose in law a stronger obligation than usual upon the latter to see that every barge in tow in such a critical emergency is steered and handled with the utmost care and skill by the crews on board of them? If, then, the owners of the tug were the bailees of the barges to tow them through the canal, and the several crews on board of the respective barges were under their command and subject to their orders and directions as given through the captain of their tug, and were engaged in aiding and assisting and serving them in towing the barges in the way and to the extent before mentioned, would it not constitute and establish in contemplation of law the relation of principals and agents between the owners of the tug and the crews of the barges in their mutual and relative connections with that undertaking, which would render the former liable as principals for any damage resulting to the property of a third person from the culpable negligence of the latter as their agents or servants in steering the barges while so under tow. But let us vary the case and suppose that by a similar collision on the canal the barge instead of the sloop had been sunk by reason of the culpable negligence of the captain and crew of the tug, would not the owners of the tug have been legally liable to the owners of the barge for the damage occasioned by it?

Such was the view which the court below took of the law of the case, and such was the legal relation which then existed between the owners of the tug and the crews of the barges according to the charge of the court to the jury on that question. And the court was correct in so charging them. 1 *Pars. on Ship. & Adm.* 534, and note 3; *The John Counter v. Adm. Court, Lower Canada*, 18 *Law Rep.* 553. Numerous cases had been cited on the other side, but they were all cases of collisions on rivers or in bays and harbors and in admiralty, and where a single ship was in tow of a tug; and yet in all those cases where it was found that the ship was under the control of the tug, the tug was held liable for her collision. *Steamer Express*, 1 *Blatchf.* 365; *Ship John Grazer*, 21 *How.* 184; *Sturgis v.*

Bowyer, 24 How. 110. And in such cases it had also been ruled that where a vessel is at a wharf or aground in a river or harbor a tug approaching it with a tow must proceed with great care and caution. *Granite State*, 3 Wall. 310; *The Syracuse*, 12 Wall. 167. The case of *Sproul v. Hemmingway*, 1 Pick. 1, had been cited and was much relied on by the other side, but there was nothing in the ruling nor in the remarks of Shaw, C. J., in announcing the decision of the court in that case which was inconsistent with the opinion of the court below in this case when it was properly weighed and considered with all the facts which appeared in it. Besides, it was the case of the collision of a brig in tow of a steamer with a ship at anchor in the Mississippi River, below New Orleans, by the default of the captain and crew of the towing steamer, and for which the owner of the brig was sued by the owner of the ship in the court in Massachusetts, and the only question before the court was whether he was liable for the collision, and it was very properly held that he was not, and all that was said beyond that hypothetically was extrajudicial.

But if the crews on the barges were not under the command and direction of the captain of the tug during the time they were towed by it, and were not for the occasion the agents or servants of the owners of it to co-operate in the proper towing of them by steering them, then there was no superior will, no master or no commander, to lead and direct the towing of them, and as there were no less than five distinct captains and crews engaged together in the undertaking, this would involve such a practical absurdity that no one could suppose that such a thing could ever have been for a moment contemplated by any one engaged or concerned in it. The entire business of the canal must become a failure if it is to be understood that such is the law, and such are the legal relations which exist between them. The business of the tug is to start the tow, to direct its course, draw it forward, to regulate its speed, or stop its motion as occasion may require, while that of the helmsman of each barge in the tow is to so steer it as to keep it as much in the wake and course of the tug as practicable, as they thus tow to better advantage so far as the tug is concerned, and with greater

security to the barges as well as other vessels in the canal, and the works of the canal company also. And it is a duty which they owe to the tug and its proprietors to steer them carefully and skillfully, and it is not only in the power and authority of the latter to require them to do this, but it is also their duty to all concerned to see that they do it. And it is the duty of the tug when meeting another vessel, either to give it so wide a berth or to go so slow that, either a collision cannot occur or if it does, it will be attended with no injury to either vessel. It was conceded by the counsel on the other side that if the tug itself, instead of one of the barges from a like neglect had collided with the sloop, the owners of the tug would have been liable for the damages, but as it was in this case, they contend that the owners of the colliding barge, and not the owners of the tug were liable for the injury. If, however, as he had shown, he thought, that the tug, her owners and commander, were the bailees of the barges, and the principals or masters in the joint undertaking which brought them together, and for which they had become the bailees of them for the time being, and the captains and crews of the barges were for the time being but their agents or servants to aid and assist them in towing them by attending to the rudders and steering them, and to receiving and obeying signals and giving them when required, then the liability of the proprietors of the tug would and should be the same for a collision between a barge, as between the tug and a vessel belonging to a third person; while the exclusive privilege which the plaintiffs in error have of towing on the canal, and the fact that the owners of the barges, as well as the owners of the sloop and her cargo, were practically obliged to submit to that privilege and to the command and authority which it conferred upon them, should afford a strong additional reason for taking this view of the relation which existed between the owners of the tug and the crews of the barges during the tow, and it should certainly increase rather than diminish the force of the legal obligations and liability which they assumed when they engaged in the undertaking to tow the barges, or have them towed, with all due care and skill toward all persons either directly or indirectly interested in the safe and proper towing of them through the canal.

T. F. Bayard, for plaintiffs in error: The question of legal responsibility presented in the case depended upon plain, equitable and practical principles adapted to all times and occasions, and comprehensive enough to embrace new cases as they arise in the progress of the changes and improvements made in the means of carrying on the trade and commerce of the country, and each case as it arises must be examined and considered with reference to its own peculiar facts before we can correctly apply the principle of legal responsibility which is to control it. The responsibility of the principal for the acts of his agent, under the precept and rule of law, *respondeat superior*, is founded upon the fact that the agent represents him in the act and is employed by him to do it. *Qui jacet per alium jacet per se*; and, therefore, in all these cases the question to be considered and properly solved is, who employed the person that did the injury? And when you say whose agent or servant the person was who did the injury, you have solved the question and fixed the legal responsibility for it on his principal or master: And to do this, you must inquire and determine who appointed or employed him, who hired and paid him, who could remove him for misconduct in doing the injury; for such a person only could be his principal or master on the occasion in contemplation of law. *Story on Agency*, secs. 452, 453; *Laugher v. Pointer*, 12 E. C. L. R. 312; *Quarman v. Burnett*, 6 M. & W. 503; *Sturgis v. Boyer*, 24 How. 122; *Milligan v. Wedge*, 40 E. C. L. R. 177. And Shaw, Chief Justice, tests the question as to the relation of master and servant in the same way in *Sproul v. Hemmingway*, 14 Pick. 5. The testimony in the case and stated in the bill of exceptions shows that each of the barges was required to have, and did have, a captain and crew of its own on board when it entered the canal, and in whose custody and possession it was during the time they were passing through it and afterward, who were employed and placed on board of it and hired and paid for as such by the respective owners of them, and who could only be removed or discharged from their employment on board of any one of them for any cause whatever by the owner or owners of it; whilst the proprietors of the tug were entire strangers to them, had no contracts with them, did not hire or

employ them, were to pay them no wages, and had no power to remove or discharge them, or to appoint others to take charge of it. Each of the crews were therefore to remain on board of their respective barges and continue in charge of them during their passage through the canal, the same as before they entered it and would after they should leave it, both by the requirement of their employers, the owners of the barges, and by the expectation of the owners of the tug, the towing company.

And what was the legal relation between the tug and the barges? Each barge having its own crew and master on board and in charge of it, and needing simply towage, or the accessory power, as it is termed by Clifford, J., in *Sturgis v. Boyer*, to draw it through the canal, the business and duty of the tug was to furnish the motive power for that purpose merely, and to draw it through the canal with safety both to the barge and to the property of all others rightfully on the canal including that of the company, so far as it depended on the exercise of due care and skill by the captain and crew of the tug on their part in the towing of it, while the business and duty of the master and crew of each of the barges was to attend with due care and skill to the rudder and the steering of it, so as to keep it in its proper course and directly in the wake and course of the tug as far as practicable, and to attend to and obey signs and signals from the tug given for their direction, and which was a business and duty that could not possibly be attended to or performed by the tug, its master and crew, or by any other person or persons but the master and crew on board of each of the barges. Their respective duties, therefore, though relative and mutual on the occasion, were as absolutely separate and distinct and peculiar to each, as if there had in fact been no union or connection between them for the time being. The barge was not delivered over to those in charge of the tug as a passive article of goods merely, as in cases of ordinary bailment, to be carried to its destination, but remained in the custody and charge solely and exclusively of its own master and crew, so far as the safe and proper towing of it, depending on the safe and proper steering of it, was involved or concerned in the undertaking. The good or bad steering of it on the occasion necessarily de-

pended wholly and solely upon the care or negligence of its own captain and crew, and in no degree whatever on that of the captain and crew of the tug.

It was, of course, equally the duty of both crews to exercise proper care, skill and diligence within the appropriate sphere and power of each in the towing of the barge, but where their appropriate and respective parts and duties to be performed in the undertaking were necessarily in the very nature of the thing to be done jointly by them, so entirely separately and distinct that the one could not possibly perform that of the other, it would be as unlawful as it would be unjust to hold the one who had been guilty of no laches, neglect, or negligence whatever, to answer for the negligence or default of the other, particularly while standing in the peculiar relations in which these two classes of servants stood to their respective masters and employers and to all other persons concerned in the matter. And the relative and mutual duties and responsibilities, and the measure of the respective liabilities of a steam-tug and vessels in tow are so stated and recognized in the cases of *The Julia*, 1 *Lush.* 231; *Gray v. Fraser*, 21 *How.* 193; *Sturgis v. Boyer*, 24 *How.* 123; *The Cayuga*, 16 *Wall.* 177; *The Steamer Webb*, 14 *Wall.* 416; *The Farragut*, 10 *Wall.* 336; *Ang. on Carr.*, secs. 668, 60; *The Duke of Sussex*, 1 *Wm. Robin.* 270. In this case and upon the distinction ruled or recognized in the cases just cited, the tug and her proprietors were not responsible for the collision, but the barge and its owners were liable for it, if it was occasioned solely by the neglect of the master and crew to steer it when it occurred. It should also be observed that there was no rule or regulation of the canal company in regard to the navigation of it which confers any power on captains of tugs over barges or the crews on board of them while having them in tow, and the utmost it seems they have the power or authority to do is to cut them loose and let them go for a neglect of duty or a disobedience of orders or neglect of signals given, but which, if it had been or could have been done in this case without cutting all the barges loose, by severing the tow-lines of the first one, which were the only lines that connected the whole of them with the tug, would have been of on avail under the circumstances to prevent the collision, for the mere

momentum of the tow and the barge in question would have then produced it had the barges been instantly severed from the tug. And there was no pretension that the tug, the captain, crew, or owners of it, had violated or infringed in any manner or degree any regulation of the company in relation to the matter. *Pars. on Ship. and Adm.* 536. And the rules of the company so far as applicable to it constitute a part of the case. *Story on Bailm., sec. 496; Alexander v. Green, 3 Hill 19.* It would be competent for the canal company doubtless to provide some needed rules in this respect to supply the omission and remedy injuries of this kind, but none have ever been prescribed.

Gilpin, Chief Justice, delivered the opinion of the court: It is to be observed at the outset that this is not a case between the steam-tug "Swallow" and the colliding barge towed by her. The question presented by this controversy, and which we are called upon to decide, arises between the owners of the tug Swallow, then having four barges in tow, and a third party, namely, the owner of a cargo of corn on board of the sloop Helen, then being towed by the plaintiffs by mule power, which was sunk in the Chesapeake and Delaware canal and damaged by reason of a collision between one of the barges then in tow and the Helen. The question of contributory negligence on the part of the Helen was properly and distinctly submitted to the jury on the trial below, and they by their verdict found in effect that the Helen was without fault as touching the collision. And thus we are confronted with the question as to who should be held to be legally responsible for the sinking and damage of the cargo of corn—the owners of the tug or the owner of the colliding barge. There certainly was fault somewhere, for which somebody is answerable. Upon whom then does the fault and responsibility rest? The plaintiffs in error contend that they were without fault; and that the injury sustained by the defendant in error is solely attributable to the fault of the colliding barge; that the plaintiffs in error, as well in fact as in law, stood in the relation of mere agents of the barge, and are not responsible in that character for the injury. In other words, they say they were not guilty of any negligence—that the tug was the

agent and the barge the principal in the transaction; and that the injury was caused by the negligence of the latter, for which they are in no way responsible. Such I understand to be the position of the counsel for the plaintiffs in error. If they are right in their view of the case then it would seem to follow as a logical result that the defendant in error is without remedy as against the owners of the tug. The proper solution of these questions must finally dispose of this case.

It becomes necessary, therefore, for us to ascertain and determine according to the rules and principles of law applicable to the case which of these parties is to be considered the principal and responsible party in this transaction. It appears by the record before us that the plaintiff in error had the exclusive right and privilege of towing all vessels on the canal both by steam-tugs and by horses or mules, except such as were propelled by steam or were provided with horses or mules of their own to tow them. With these exceptions they enjoyed by contract with the canal company the exclusive right and privilege of towing all vessels in and through the canal. It follows, therefore, that such as had not the means of propelling their own vessels were of necessity compelled to employ the plaintiffs in error for this purpose. The barges in question were utterly destitute of all means of propulsion. The tug at the time of collision had the four barges in tow, each belonging to different persons, and each having a separate and independent commander on board, and those barges attached to each other and to the tug, but each having an independent commander, were being carried through the canal.

Now, under these circumstances, with what show of reason, in view of the facts, can it be contended that the several barges stood in the relation of principals to the tug, and that the latter was subordinated to and hence subject to the direction and control of the several commanders of the different barges? In this view of the case there would be four separate and independent commanders differing perhaps in their opinions and in their directions to the tug. It is to be supposed for a moment that the business of towing could be safely carried on under such circumstances? It seems to me that the exigencies of the business

and its safe prosecution require that the authority to direct and control should be a unit and should reside with the steam-tug. The four barges were attached together and to the tug by hawsers or lines—the first by two lines about twenty feet astern of the tug, the second by one line to the first barge ten or twelve feet astern of her, and the third and fourth barges attached in like manner and distances from each other. As heretofore remarked, the barges had no motive power of their own. Whatever motion they had was imparted to them by the tug. The barges and tug attached together, as above described, were substantially and in effect one combined moving mass whose momentum was the result of the tug's motive power acting on both the tug and the barges. It would seem to be manifest, therefore, that the navigation of the barges was dependent upon and controlled by the navigation of the tug.

The business of towing vessels by steam power, although of comparative modern date, has grown to be an important and extensive branch of business in most of the harbors, rivers, and canals of the country. The power of the tug over the course and navigation of the tow is practically paramount and controlling, and hence it follows that a corresponding responsibility should attach to her for any injury which may have happened to innocent third parties from collision with the tow in her charge. And especially must this be so where the tug herself is in fault in not using *proper timely precaution* in guarding the tow against the danger of injury to third parties being committed by her. As the business of towing by steam power has in fact become a specialty, the words "ordinary diligence, care, and skill" do not sufficiently indicate and define the *measure of duty* required of the commander of a steam-tug engaged in this business. It is something more than ordinary. A person who is called upon without any special qualifications to perform a particular service is expected to apply only such care and diligence as is usually bestowed by persons of ordinary common sense. But a specialist engaged in his specialty is bound to exercise special care and diligence. The distinction is not merely nominal, it is real, and challenges the approval of reason and common sense. The law recognizes it as a just and proper distinction.

The duty which the commander of a steam-tug engaged in the business of towing assumes to perform, requires of him by reason of its being his specialty a higher degree of caution, diligence and skill; not merely the diligence of an ordinary person or non-specialist, but the diligence and skill of a good business man in his particular specialty. And the skill and diligence required must be commensurate with the duty to be performed, and the measure of the care and timely precaution to be exercised must rise in proportion to the dangers of the service.

The founders of the ancient common law never so much as dreamed that steam would ever be applied as a motive power in the propulsion of vessels, and, of course, they could not have anticipated its use in the business of towing. But it is justly claimed as indicating the practical wisdom and advantages of the common law, as illustrated by the current of judicial decisions from the time of Lord Mansfield up to the present day, that it adapts itself to the manifold and varying necessities of commerce as they from time to time arise in the progressive development of the business of the country. And considering this to be so it seems to me that it would be a reproach to our system of jurisprudence, if an adequate remedy could not be found in a case like this where no remedy can be had in admiralty in consequence of the injury having occurred in the waters of a canal. The question to be determined should always be who was in fault in the particular case.

Considering, as I do, that the barges and their crews were for the time being subordinated to and under the direction and control of the tug and her commander, I am of opinion that there exists no error in the charge of the court below. But even apart from the doctrine of *respondent superior*, I am of opinion that the tug was in fault, or, in other words, was guilty of negligence. The commander of the tug was bound to know and to guard against the dangers of the navigation. It was incumbent upon him, as matter of duty, to know there were bridges to pass through, that vessels were almost constantly passing each other in their transit through the canal, that the natural and uniform effect of the tug moving through the water at her usual rate of speed would be to lift and draw a vessel from the side of the

canal into the wake of the tug; and therefore he was bound by timely forecast and precaution to guard against such a result, especially in a case like this, where he had a string of four barges in tow behind him, occupying a space of several hundred feet in the rear of the tug. He, of course, knew of the curve in the canal on the westerly side of the bridge, and that the tug was liable to be suddenly approached by vessels from that direction; and it was his duty to keep a sharp lookout for them, and to sufficiently slacken the speed of the tug, or, if need be, to stop her altogether, in order to avoid the danger of collision. If he had done either the one or the other when he first saw the Helen approaching, the collision would in all human probability have been avoided. But, instead of doing this, he kept right on, only slightly slackening her speed, until after the tug and two of the barges had passed the Helen.

In view of all the facts disclosed by the record I do not think he used that timely care, forecast, and precaution which the circumstances of the case and the law, as I understand it, demanded of him, and hence that he was guilty of negligence.

In addition to the authorities cited in the course of the argument by counsel on both sides, I would refer to the following cases of *The Express*, 1 Black. C. C. R. 365; *The Syracuse*, 12 Wall. 167; *The John Counter*, 18 Law Reporter 553; *The R. W. Forbes*, 19 Law Reporter 544; *The Lady Pike*, 21 Wall. 1; *The Mohler*, 21 Wall. 230; *Wharton on Negligence*, secs. 32, 33, 947.

The judgment below is affirmed.

Saulsbury, Chancellor, dissented on the grounds assigned in the following opinion by him. He said his opinion would be confined to the causes of error assigned which related to that portion of the charge to the jury by the court below and which declared that the owners of the several barges for the time being, and for the purposes of transportation on the occasion in question, were the agents and subordinates of, and under the control and direction of the tug's commander, and that the owners of the tug being the principal, and the owners of the barges being their agents or subordinates, were liable to the plaintiffs below, pro-

vided the collision was occasioned by negligence or want of ordinary care, skill and diligence on the part of any person whose duty it was to steer the barges. The persons whose duty it was to steer the barges were the persons in and upon the barges, and they were the same persons who were on them before and at the time when the commander of the tug assumed the duty of towing them through the canal, and they continued on them while the barges were being towed through it, and it was the duty of the commander of the tug to tow the barges with those persons who constituted their crews upon them. He had no authority to displace them and to supply their places as steersmen with other persons. They were the employees of the owners of the barges and were entitled to receive pay from them while passing through the canal in like manner as when passing over the Delaware or Chesapeake Bay. They were not employed in any manner by the owners or the commander of the tug. They could not, therefore, have been responsible for their misconduct to the owners of the tug. Under these circumstances it is not in my opinion reasonable to consider them or the owners of the barges the agents or subordinates of the owners of the tug, or to consider the owners of the tug their principal in any sense whatever. There was no element of agency or of principal and agent in the relation which existed between the owners or the commander of the tug and the owners of the barges or the persons on them.

The law in relation to the business of towing vessels is of recent origin. In my opinion, which, I think, is warranted by the authorities, the contract of the owners of the towing vessel with the owners of the vessel towed, and their obligation to third parties, extended no further than that by no act of those having the towing vessel in charge, willful or negligent, shall the tow or such third party suffer injury or loss. No man is responsible for an act of commission or negligence which he did not do, command, aid, or assist in doing, or neglect to do, having the power to act to the contrary, or which he could not prevent being done. The contract of towage does not invest the towing party with the authority to displace the persons on board of the vessel towed, or from the command or management of it, and

imposes no obligation upon them other than to properly tow the vessel, and to give such signs, signals, and directions, and to exercise such careful supervision as to the steering and management of the vessel towed, as may be proper, according to the circumstances as they shall arise. It is the duty of the persons on board of the vessel towed to steer it as near as may be in the wake of the towing vessel, and to obey all proper signs, signals, and directions of those in command of the towing vessel, and to be in a position to receive these signs and directions, and to exercise due care and diligence in these respects. They are bound to be at their posts of duty and to perform it faithfully, and if by their omission to do so, those in command of the towing vessels being themselves in no default, if injury or loss thereby results to the towed vessel or a collision occurs with another vessel and injury or loss thereby results to a third party, the owners of the towing vessel are not chargeable, but the owners of the vessel towed must in the one case suffer the loss and injury, it being occasioned by their own act or by the act of those in their own employ, and in the other case for a like reason they must answer in damages to such third party.

It was the duty of the commander of the tug in this case to connect it with the barges and to furnish them with the motive power properly directed to pass through the canal. If he did that, and performed those other acts of duty and careful supervision which I have named, his whole duty was fully discharged. If it be said that he might have refused to tow the barges through the canal in case the men whose duty it was to steer them persisted in neglecting that duty, and because he did not do so, but undertook to tow them notwithstanding their neglect, he thereby made himself responsible for their negligence, it must be shown and not assumed that such a responsibility is imposed by a contract of towage. No authority has or can in my opinion be shown establishing that principle. Some weight seems to have been given in the argument, and even in the opinion of the court below, to the circumstance that the Bradys had a contract with the canal company—securing to them the exclusive right of towing vessels through the canal. It may be improper on the part of the canal company to enter into such a contract, and if by

doing so those having a right to pass through the canal shall be delayed, suffer inconvenience, or be deprived of proper facilities for passing through it, the company may by such act become liable in damages to such persons, but this would not change the law or increase their responsibility in respect to those for whom they tow or in respect to third parties passing through or using the canal.

The argument advanced, that if the owners of the tug are not liable for any damage done the sloop in this case by reason of the neglect and negligence of those on board of the barge which collided with it, the owners of the sloop would be without remedy owing to the circumstances that the owners of the barge are unknown and reside out of the State, and no authority existed by which the barge itself could be seized and detained and sold to satisfy such damage, can have no effect in the decision of this cause. We are not to make, but to decide the law. If there be a defect in this respect it arises from the want of legislation on the subject. The court cannot supply the defect. It is not at all uncommon for many barges and for several vessels to be towed at the same time by a single tug or steamer, and to hold that in such a case the tug or steamer or their owners should be liable for the negligence of every crew and helmsman on board of each barge or vessel composing such a tow, on the principle that each of the persons so employed on board of them and each of them, were for the time being and for the purpose of the towing of them the agents or servants of the owners of the tug or steamer would work the destruction of the towing business. This result is not suggested for the purpose of showing what the law is, but that my interpretation of it is more reasonable than the contrary interpretation of it.

In the courts exercising admiralty jurisdiction, where both the towing vessel and the vessel towed are in default, and injury or loss is occasioned by collision with another vessel, they are both liable in damages for it, which are assessed according to the proportion of injury which they have occasioned, or according to the breach of duty of which each has been guilty; but neither in admiralty nor in the common law courts will the towing vessel be held liable for loss or injury occasioned solely

by the vessel towed; nor will the vessel towed or its owners be held liable in damages for loss or injury wholly occasioned by the towing vessel. In the common law courts where loss or injury is occasioned by both the towing and the vessel towed, both are liable for the whole amount of damage done, and in such case there is no apportionment of the damages. The principles which apply to cases of collision on navigable rivers, bays, arms of the sea, and in harbors, in my opinion apply to collisions in canals and other artificial channels of water communication. I find no cases to the contrary. The cases referred to in the note to *Parson on Mercantile Law* do not support the note itself, which seems to recognize a distinction in this respect. I shall now proceed to show that the authorities support the opinions which I have expressed.

In the case of the *Cleadon, Lush* 13, the court held that the towing and the towed vessel were to be considered as constituting one long steamer for the conduct of which the vessel towed was responsible; that a vessel being so towed in the night time was bound to avoid other vessels, and in such case the motive power was in the towing vessel and the governing power in the vessel towed; and the authority of which was recognized in the case of the *Arthur Gordon, Lush*. 14, and in subsequent cases in the courts of England. And if such was the correct doctrine and it was applicable to towing generally, the principle he had stated in reference to the liability in the present case would seem to be strengthened rather than weakened by it. In the case of the *John Counter*, 18 *Law Rep.* 553, cited in the note to *Pars. on Merc. Law*, which note was read in the argument, the towing steamer was held responsible for damage done to a brig by collision with a barge in tow of the steamer. She was struck by two of the barges in tow of the steamer and the evidence in the case clearly showed that the responsibility for it rested solely on the pilot and the master of the steamer towing them, and in commenting upon it the court in the opinion says: "Cases may occur in which an accident may arise from the fault of the tow without any error or mismanagement on the part of the tug, and in such case the tow alone must be answerable for the consequences." But in that case there was no recognition of the

doctrine of principal and agent as applicable to the owners of the steamer and the men steering the barges. In the case of the *Syracuse*, 12 Wall. 171, Mr. Justice Davis in delivering the opinion of the court says: "Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management the exercise of reasonable care, caution and maritime skill, and if these are neglected and disasters occur the towing boat must be visited with the consequences. It is admitted in the argument and proved by the evidence that the canal boat was not to blame, and the inquiry therefore is, was the steamer equally without fault?" In that case a barge or canal boat near the rear end of as many as forty in all in tow of the steamer into the harbor of New York was damaged by collision with a vessel lying at anchor in it, and the court held that the commander of the steamer with so long a line of canal boats in tow was guilty of negligence in neglecting to divide it before he attempted to tow such a line through the harbor. There was no recognition in that case of the doctrine of principal and agent as applicable to the relation existing between the steamer and the crew of the canal boat.

In the case under consideration it nowhere appears that those in charge of the tug did not exercise reasonable care, caution, and maritime skill, or that these were neglected, but it does appear that the disaster occurred from the neglect of those in charge of the barges from not steering them in the wake of the tug, and from being absent from their post of duty, so as not to be able to answer the signal of the tug to steer the barges aright when that signal was given by those in command of the tug.

In the case of *Sproul v. Hemmingway*, 14 Pick. 1, it was decided that the owner of a brig towed lashed to the side of a steamboat employed in the business of towing vessels on the Mississippi River below New Orleans, and which through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, was brought into collision with a schooner at anchor, was not responsible for the damage sustained by the schooner. The court in that case, while very properly holding that the owner of the brig was not respon-

sible for the negligence of the master and crew of the steamboat towing it, very clearly states what would have been their opinion had the brig been towed astern of the steamboat by means of a cable, and the damage had been occasioned by the negligence of those on board of the brig, for they say "that on board a ship towed astern of a steamer by means of a cable something may and ought to be done by the master and crew keeping watch, observing and obeying orders and signs, and if there be any want of care and skill in the performance of these duties and damage ensue, then the case we have been considering does not exist; the damage is then attributable to the master and crew of the towed ship, and they and their owners must sustain it." The jury were so instructed at the trial and it was left to them to find whether the damage was caused by the negligence of the one or the other.

In the case of *The Owners of the Brig James Gray v. The Owners of the Ship John Fraser*, 21 Wall. 184, it was decided that where a vessel being towed into port by a steam-tug came into collision with a vessel at anchor, and the steam-tug and vessel at anchor were both in fault, the loss was to be equally divided between them, provided the ship in tow was thrown against the vessel at anchor without any fault or negligence of the vessel in tow. The collision occurred in Charleston harbor. The John Fraser was being towed into it by a steamer and was driven against the James Gray lying at anchor and injured her, for which the owners of the James Gray sued the owners of the John Fraser; and the court said that, "as this collision was forced upon the John Fraser by the controlling power and mismanagement of the towing steamer, and not by any negligence or fault on her part, she ought not to be answerable for the consequences. Suppose, however, that it had not been forced on her by the controlling power and mismanagement of the towing steamer, but by some fault or negligence on her part, is not the inference irresistible that the decision would have been that the owners of the towing steamer were not, but the owners of the John Fraser were answerable for the consequences. It was not contended in that case that the relation of principal and agent existed between the owners of the towing steamer and the master and crew on board of the John Fraser which she had in tow.

If such relation had existed between them then the John Fraser would not have been answerable for the consequences had they resulted solely from fault and negligence on her part, or on the part of her master and crew, because if the latter were the agents of the owners of the towing steamer at the time, their fault and negligence would have been the fault and negligence of their principals, the owners of the steamer which had her in tow.

The case of *Sturgis v. Boyer et al.*, 24 How. 110, established these principles that where the tug and tow were both under the command of the master of the tug, who gave all the orders, none of the ship's crew being on board the tug except the mate, who did not interfere with the management of the vessel. the tug is responsible for the whole loss incurred. Second, that a case may arise when both the tow and the tug are jointly liable for the consequences of the collision, as where those in charge of the respective vessels jointly participate in their control and management, and the master or crews of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Third, whenever the tug is under the charge of her master and crew, and in the usual and ordinary course of such an employment undertakes to tow a vessel which for the time being has neither her master nor crew on board, over waters where such accessory motive power is necessary or is usually employed, she must be held responsible for the proper management of both vessels. In that case the court says: "Whether the party charged ought to be held liable is made to depend in all cases of this description on his relation to the wrong-doer. If the wrongful act was done by himself or was occasioned by his negligence, of course he is liable, and he is equally so if it was done by one toward whom he bore the relation of principal; but liability ceases where the relation itself entirely ceases to exist, unless the wrongful act was performed or occasioned by the party charged."

The law applicable to this subject in my opinion is correctly stated by Judge Nelson in the case of the *Express*, 1 Blatchf. C. C. Rep. 365. He says "The business of towing by steamboats is comparatively modern, and has become extensive on all the navigable rivers of the country. The obligations and responsi-

bilities arising out of this kind of navigation and properly resting upon the respective vessels concerned are novel and peculiar, and there may be some difficulty in assigning to each vessel its proper measure of responsibility, a difficulty that is intrinsic and arises out of the peculiar relations which the respective vessels bear to each other in the course of the navigation. In all cases where the tug is under the direction and control of the master and hands on board of the tow, there is no difficulty in assigning to the latter a responsibility for all the damage that may happen through the fault of either vessel. The converse of the proposition will hold equally good where the tow is under the exclusive direction and control of the tug. But where there is a divided command and direction in the navigation of the vessel, there must necessarily be in some measure a divided and several responsibility assigned to each. What that measure shall be is a question of some difficulty. In the case before us the helm of the tow was under the direction of her captain, but all other means used in her navigation were under the absolute control and direction of the master of the tug. Such is understood to be the common relation which these different vessels bear to each other in the business of towing up and down the North River. Now, although the tow and her master and owners are properly chargeable for any injuries that may happen by reason of neglect or unskillfulness in her management in the course of the voyage, it by no means follows that the tug is free from fault. Her power over the navigation of the tow is paramount and controlling, and a corresponding responsibility attaches. Therefore in all cases where the proper and reasonable exercise of that power can be interposed for the purpose of arresting and avoiding the impending injury, she is bound to exert it faithfully and should be held answerable in case of neglect. Her whole duty is not discharged when she is so navigated as to avoid committing immediately the injury herself."

In the present case it would have been perfectly proper for the court below to have instructed the jury that it was the duty of the person in charge of the tug to exercise a watchful supervision with respect to those steering the barges, and to see that they steered the barges properly throughout the entire passage

through the canal, and if they neglected so to do, and only attended to this duty when the collision was unavoidable, omitting it before that, then that neglect was such default of duty as to render the owners of the tug responsible as well as the owners of the barges. Whether there was such a want of supervision was a fact upon which the jury might properly have passed.

I therefore am of the opinion that the court below erred in their charge to the jury that the relation of principal and agent or subordinates existed between the owners of the steam-tug and the persons on board of the barge whose duty it was to steer them while being towed by the tug through the canal, and that the owners of the tug were their principals and they were their agents or subordinates in their joint or common undertaking, and as such principals the owners of the tug were liable for any injury which resulted to the sloop and the plaintiffs from the negligence of those whose duty it was to steer the barges. We do not know upon what grounds the jury returned their verdict. It may have been because in their opinion on the facts proved that the collision was occasioned by the mismanagement, want of care, or negligence of those in command of the tug, or it may have been because they believed it was occasioned by the negligence of those whose duty it was to steer the barges. The charge of the court would have warranted the verdict on that ground alone, even if the jury were of opinion that those in command of the tug had been guilty of no default whatever in the matter. It was, therefore, in my opinion too broad, and for that reason erroneous in law. I am accordingly of the opinion that the judgment of the court below in this case should be reversed.

THE JUNCTION AND BREAKWATER RAILROAD COMPANY *v.*
ROBERT H. DAVIS, ESQ., State Treasurer.

Under the act of assembly to loan the J. & B. R. R. Co. the bonds of the State to the amount of four hundred thousand dollars on the mortgage of the company for that amount, and the amendment and the supplement thereto,

the mortgage to be without interest for two years from its date, and forty-eight thousand dollars of the bonds to be retained and sold by the State treasurer to pay the interest for the two years, but which were not sold, he having paid the same out of the current revenue of the State, *Held* by the court that the State was not entitled under the acts of assembly referred to, to interest on the mortgage for the first two years, as the bonds retained for that purpose had not been sold by the State treasurer.

THIS case came up on a case stated from the Supreme Court in and for Sussex County, and was heard at this term before all the judges in the Court of Errors and Appeals, with the exception of Houston, J., who declined to sit because he had been a stockholder in, and the president of the railroad company when the acts of assembly referred to in it were enacted, and the mortgage of the company to the State was executed under them.

The case stated was in substance as follows: That the General Assembly passed an act on March 14th, 1865, for the purpose of aiding the said railroad company to complete their railroad from Milford to Lewes, by a loan of four hundred thousand dollars in the bonds of the State with coupons annexed for the semi-annual payment of the interest thereon at six per cent., payable on or before the 1st day of January, A. D. 1890, to be secured by a first mortgage and lien by the company on all the railroad then built and all the lands then owned by the company, and on all the railroad thereafter to be built by it, and on all the lands thereafter to be owned by it, subject to the following further terms and conditions substituted and provided in an amendment to the act passed on the 13th day of February following, that as soon as the directors of the company should have procured *bona fide* subscriptions to the capital stock of it to the amount of fifty thousand dollars in addition to the capital stock already subscribed at the date of the passage of the said original act, and satisfied the State treasurer by their oath or affirmation that one-half of that additional subscription had been collected and paid in money to the company or in materials or in work and labor required in the construction and completion of the railroad, it should be his duty to cause the bonds of the State to be made to the amount of four hundred thousand dollars, in the denomination of one thousand dollars

each, payable on or before the 1st day of January, 1890, with semi-annual coupons annexed to them for the payment of the interest thereon at the rate of six per cent. per annum on the 1st day of January and the 1st day of July in every year until the principal should be paid, and to deliver to the company the said bonds of the State to the amount of one hundred and thirty-two thousand dollars; and whenever it should afterward appear to the satisfaction of the State treasurer as aforesaid that further *bona fide* additional subscriptions had been made to the capital stock of the company to the further amount of fifty thousand dollars, and that the one-half thereof, together with the balance or residue of the said additional subscription of fifty thousand dollars before mentioned and prescribed, had been collected and paid to the company in like manner as aforesaid, it should be his duty to deliver to the company the said bonds of the State to the further amount of forty-four thousand dollars; and whenever it should afterward appear to the satisfaction of the State treasurer as aforesaid that further *bona fide* additional subscriptions had been made to the capital stock of the company to the further amount of fifty thousand dollars, and that the whole amount of the same, together with the balance or residue of the said additional subscription of fifty thousand dollars secondly above mentioned and prescribed, had been collected and paid to the company in like manner as aforesaid, it should be his duty to deliver to the company the said bonds of the State to the further amount of eighty-eight thousand dollars; and whenever it should afterward appear to his satisfaction as aforesaid that further *bona fide* subscriptions had been made to the capital stock of the company to the further amount of fifty thousand dollars, and that the whole amount thereof had been collected and paid to the company in like manner as aforesaid, it should be his duty to deliver to the company the said bonds of the State to the further and like amount of eighty-eight thousand dollars—and making in the aggregate the amount of three hundred and fifty-two thousand dollars in the said bonds of the State so to be delivered by him to the company. But he was directed in other provisions of the said original act to retain the balance of them, amounting

to forty-eight thousand dollars, and was further authorized and directed to sell them at such time or times and in such manner as he might deem proper, and to apply the proceeds of the sale of them to the payment of the interest on the mortgage of the company to the State for two years from the date of it, and which was to bear interest at the rate of six per cent. per annum from its date, and to be payable on or before the 1st day of January, 1890.

Afterward in the month of December, 1866, having obtained fifty thousand dollars in additional *bona fide* subscriptions to the capital stock of the company, and collected one-half of the amount thereof as required by the said act and satisfied the State treasurer of the same as therein provided for, he caused the State bonds to be prepared and printed in all respects as prescribed and directed in the said acts of assembly, the first interest coupon annexed to each one of them as so prepared and printed being made payable July 1st, 1867. The act further required that in consideration of the said bonds of the State so to be delivered to the company as aforesaid, and of the amount of the forty-eight thousand dollars of them to be retained by the State treasurer and applied for the benefit of the company as aforesaid, the directors of it should prepare, execute, and acknowledge the said mortgage of the company to the State for four hundred thousand dollars, and deliver the same to the State treasurer at the time of the delivery by him to the company of the said bonds of the State to the said amount of one hundred and thirty-two thousand dollars hereinbefore first mentioned as aforesaid, and that he should cause the said mortgage to be duly recorded as provided for in the said act. That afterward, on the 8th day of May, 1867, the said mortgage was duly executed, acknowledged and delivered by the directors of the company to the State treasurer, and it was accepted by him and was caused to be duly recorded by him; but he thereupon refused to deliver to them or the company the said first installment of the bonds of the State to the amount of one hundred and thirty-two thousand dollars, and would only deliver them to the amount of one hundred and twenty-eight thousand dollars, and retained the balance of them, consisting of numbers 129, 130,

131, and 132, for one thousand dollars each, and dated on the 8th day of May, 1867, even date with the mortgage of the company, on the ground that the first interest coupon annexed to each of the bonds would carry interest from January 1st, 1867, and the mortgage only from the 8th of May in that year, and the interest on the mortgage would be about four thousand dollars less than the interest on the bonds, as he estimated it. He insisted on retaining the four bonds mentioned until the next session of the General Assembly, subject to its order and direction as to the disposition of them when it should again meet.

It was not until the 26th day of October, 1868, that the company became entitled to the second allotment or installment of the said State bonds in accordance with the provisions of the said acts, when application was duly made on its behalf to the State treasurer for the delivery of them to the amount of forty-four thousand dollars with all the interest coupons annexed to each of them and as they had been prepared and printed for delivery to the company; yet, notwithstanding the State treasurer was satisfied by the oath of the directors that the company had complied with all the conditions prescribed in the said acts for that purpose, he refused to deliver them to the company with all the said interest coupons so annexed to them as aforesaid, but insisted on severing from each one of them and retaining, and did thereupon sever from each one of them and retain in his possession, the four semi-annual interest coupons then annexed to each one of them, payable respectively on July 1st, 1867, on January 1st and July 1st, 1868, and on January 1st, 1869; but he consented to deliver and did then deliver the said bonds to the amount of forty-four thousand dollars with all the other and remaining semi-annual interest coupons annexed to each one of them to the company.

On the 6th day of April, 1869, the General Assembly enacted a supplement to the act before first mentioned directing the State treasurer to deliver to the company the said four State bonds for one thousand dollars each, with all the semi-annual coupons remaining annexed to them for the payment of interest, which had been retained by him as hereinbefore stated, and also directing him to deliver to the company all the semi-annual coupons

for the payment of interest on the said forty-four State bonds for one thousand dollars each which were severed therefrom and retained by him when the said forty-four bonds were delivered to it as hereinbefore stated; and both of which orders were thereupon duly executed by him. The same supplement also provides that no interest shall be required to be paid to the State on the said mortgage of the company until the interest and coupons on the said bonds of the State, which shall have been paid by the State, shall amount to forty-eight thousand dollars, that is to say, to the amount of the said bonds directed to be retained by the State treasurer in the said act to which this is a supplement.

On the 14th day of September, 1869, and upon a full compliance by the directors of the said company with the terms and conditions prescribed in the said acts for that purpose, the said third allotment or installment of eighty-eight of the said State bonds for one thousand dollars each, amounting to eighty-eight thousand dollars, was delivered by the State treasurer to the company; and on the 27th day of October following under like circumstances the fourth and last allotment or installment of eighty-eight of said State bonds for one thousand dollars each, amounting to eighty-eight thousand dollars, was delivered by the State treasurer to the company; but he claimed the right and authority to sever, and did sever from each of the said bonds included in the last two allotments of them above mentioned, all the semi-annual coupons annexed thereto for the payment of interest on them from January 1st, 1867, to July 1st, 1869, and retained them in his possession against the claim and demand of the company.

All the foregoing facts occurred during the term of the late incumbent in the office of State treasurer; he had no occasion, however, to sell, and never did sell any of the forty-eight State bonds to meet the interest as it accrued on the loan, but having a surplus of revenue in the treasury he had paid it out of the general funds of the State, and with the sanction of the General Assembly has since surrendered them just as he received them to a joint committee of the two houses by whom they have been cancelled on behalf of the State.

That his successor in office, the defendant in this action, as State treasurer, on or after the said 1st day of January, 1871, rendered an account to the plaintiff, the company, of interest due the State to that date, which was substantially as follows:

132 State bonds delivered July 9th, 1867.	
44 " " " Oct. 26th, 1868.	
176	
24 of the 48 reserved.	
\$200,000. Interest from January 1st, 1867, to	
January 1st, 1871, ...	\$48,000
88 State bonds delivered Sept. 14th, 1869.	
88 " " " Oct 27th, 1869.	
176	
24 of the 48 reserved.	
\$200,000. Interest from July 1st, 1869, to	
January 1st, 1871, ...	\$18,000
	\$66,000
Cr. by 48 bonds reserved, ...	48,000
Bal. claimed January 1st, 1871, . . .	\$18,000

The said balance of eighteen thousand dollars was thereupon demanded of the plaintiff by the defendant and a foreclosure of the mortgage was threatened by him if the same should be refused, but the plaintiff then insisted that upon a true and correct construction of the acts of assembly as before stated and the facts hereinbefore fully set forth, the sum due for interest over and above the said sum of forty-eight thousand dollars was not more than the sum of ten thousand and eighty dollars, which last sum the plaintiff was willing to pay. Nevertheless, the plaintiff was required to pay, and did pay to the defendant on the 17th day of March, 1871, the sum of eighteen thousand dollars, at the same time protesting that only a portion thereof was due, and reserving the right to sue for and recover so much

thereof as might not be legally and truly due to the State, and thereupon took from the defendant a written receipt for the payment of the same acknowledging that it had been so paid under protest with the right reserved to the plaintiff to sue for and recover so much thereof as might not be legally and justly due as aforesaid. And this suit is instituted for that purpose.

If the court shall be of opinion upon the facts stated that the whole or any portion of the said sum of eighteen thousand dollars so demanded and paid as aforesaid, was not lawfully due and properly paid under a correct construction of the acts of assembly before recited, then judgment shall be entered for the plaintiff for such sum as the court shall consider was illegally and wrongfully demanded and improperly paid, with interest from the date of such payment; otherwise judgment shall be entered for the defendant, either party to have the right to remove the case on a writ of error to the Court of Errors and Appeals. Dated and signed by the respective counsel April 15th, 1874.

Bates (*Moore* with him), for the plaintiff: The question for the court to consider in the case is a simple one, and that is what was the nature of this loan, as it was intended from the first, by the legislature to the company? The original act of February 14th, 1865, contemplated that the whole amount of the State bonds to be issued to the company under the provisions of it, three hundred and fifty-two thousand dollars, would be delivered to it, although the act did not require it, within two years after the execution and delivery of the mortgage of the company to the State for four hundred thousand dollars to secure the repayment of the loan to that amount with interest upon it from and after two years from its execution and delivery; and it was evidently designed to be a loan at simple interest, and not as a discount on its own paper or bonds loaned to the company. We therefore confidently contend that not only the original act, but all the subsequent acts and legislation referred to in the case, clearly and conclusively show that the forty-eight bonds, amounting to forty-eight thousand dollars, which the State treasurer was directed to retain out of the four hundred

ordered to be prepared, and to dispose of for the purpose prescribed in the original act, were designed as a fund reserved and set aside simply to meet the interest on the bonds which in the meantime should be emitted, as the same should become payable from time to time during the first two years after the mortgage had been delivered, and that it was not conceived or intended in any sense or respect to operate as a profit, a premium, or a discount on such a loan for that amount to the company without interest for two years. But whilst it was doubtless intended for the ease and relief of the company for the period limited, the State certainly lost nothing by requiring the interest for those two years to be paid in advance.

In the conclusion of the argument they presented on behalf of the plaintiff the following statement of the amount of interest which was due the State on January 1st, 1871, in lieu of that made by them in the case stated, and which they now desired to correct, and which shows the true amount of the alleged overpayment:

Bonds received to be applied to the payment of interest, ...	\$48,000
Interest on \$176,000 from January 1st, 1867, to July 1st, 1869, ...	\$26,400
Interest on \$352,000 from July 1st, 1869, to July 1st, 1870, ...	21,120
	\$47,520
Balance of \$48,000 remaining to the credit of the company, ...	\$480
Interest for six months on \$400,000 from July 1st, 1870, to January 1st, 1871, ...	12,000
Deducting the above balance of \$480, amount of interest due January 1st, 1871, was, ...	\$11,520
Amount of interest claimed and paid to January 1st, 1871, was, ...	18,000
Amount of overpayment on March 17th, 1871, ...	\$6,480
and for that amount with interest on it from that date the suit is brought.	

Penington, Attorney-General, for the defendant: The passage of the act of assembly referred to and the acceptance of it by the company constituted a contract between the State and the company for a large loan of money by the State to a corporation created by it, and if it was vague and uncertain in the terms and provisions of it on the point in question, as it was in his opinion, it should, in accordance with a well-settled rule of construction in like cases, be construed favorably for the State and against the other party, and the general reason for the rule would readily occur to the mind of the court without his suggesting it. It certainly required no doubtful or disputed construction of it in favor of the plaintiff to constitute it a remarkable demonstration of the State's liberality and even generosity to the company. And after all it has received from its favor and its bounty, it should not now ask for another dollar from its treasury to which it is not clearly and unquestionably entitled under the law. It was by a wise and sound exercise of his discretion the late State Treasurer paid the forty-eight thousand dollars of interest, less a very small amount of it, out of the current revenue of the State without disposing of one of the forty-eight State bonds directed to be retained and reserved for that purpose, for he thus prevented any compounding of interest on that portion of the loan which would have occurred had they been sold with their coupons annexed, to meet the payment of the first forty-eight thousand dollars of interest from which the mortgage of the company was exempted for the first two years; and the fact that it was so paid out of the current revenue of the State, strengthened rather than weakened the just and legal demand of the State to have every dollar of it repaid into the treasury by the company. It was manifest that the design and provision of the statute has been either literally performed or substantially complied with by the company, and there was therefore some room left for the exercise of a sound discretion on the part of the court in administering what would seem to be but fairness and justice under the circumstances between the parties in the case.

By the Court: At a subsequent day during the term the fol-

lowing entry was directed by the court to be made on the record of the case. It is therefore considered by the court that upon the true construction of the acts of assembly set forth in the case stated, the amount of interest which was due from the plaintiff to the State upon the mortgage recited in the case stated on the 1st day of January, A. D. 1871, was the sum of eleven thousand five hundred and twenty dollars, and that the payment made to the defendant under protest on the 17th day of March, A. D. 1871, of eighteen thousand dollars, was an overpayment of six thousand four hundred and eighty dollars, which the plaintiff is entitled to recover in this action with interest thereon from said 17th day of March, A. D. 1871, with directions that the same should be certified to the court below.

SUPERIOR COURT.

FALL SESSIONS.

1875.

ROBERT D. HOFFECKER and JOHN S. HOFFECKER, trading as
HOFFECKER & BROTHER, *v.* THE NEW CASTLE COUNTY
MUTUAL INSURANCE COMPANY.

A special plea in an action on a policy of insurance that the plaintiffs permitted the building insured to be used for purposes which increased the risk of loss by fire, without stating what such purposes were, is deficient in particularity and demurrable.

Since the repeal of the stamp acts of Congress deeds executed and delivered while they were in force, but without any United States internal revenue stamp upon them, must be recorded by the recorder of deeds for the county if tendered for that purpose, and there is no other objection to recording them.

If neither the attorneys nor the members of the court are agreed as to what a witness said as to a material fact in the trial of a case, the court will leave it to the jury and decline to nonsuit the plaintiff for the want of sufficient proof as to the fact to which his statement referred.

If at the time of the application and issuing of the policy the insured is in possession of the whole of the property as the lawful and rightful owner of it, and in his application represents himself to be the owner of the whole of it, the court will not nonsuit him in an action on the policy for the loss of it by fire, although it appears from the evidence that he had never had a deed but for one moiety of it, and that without any United States revenue stamp upon it as then required by the act of Congress up to the time of filing his application and the granting of the policy, either on the ground of misrepresentation in the application as to his ownership of the whole of the property, or on the ground that he had not then the legal title to any part of it.

The charter of a mutual fire insurance company provided that in case of an injury or loss by fire the insured should give immediate notice of it to the

president or secretary at the office of the company, and that the company should be liable to a suit for any loss if it should not be paid within ninety days after notification of such loss. The plaintiffs in the case gave notice of the loss to the president at the office of the company in four days after the fire and required the payment of the amount of the insurance by letter, and the secretary by the direction of the president replied to their letter declining to pay it. *Held*, that it was due notification of the loss, and that the reply of the president through the letter of the secretary was a refusal to pay it, which amounted to a waiver by the company of its exemption from liability to be sued for it under the charter until ninety days after the notification of the loss.

The insurance on a stock of goods in a building after their removal from it may be transferred to the building by the secretary, with the knowledge and consent of the company express or implied, on the request of the insured, by a written indorsement under his hand on the face and in the body of the policy and above the signature of the president and the seal of the company after its execution and delivery, and without any alteration to the same effect being made in the written application of the insured on which the policy was issued. And such transfer of the insurance will not vary or affect the terms of the policy or the application in any respect beyond the mere fact of transferring the insurance from the goods to the building. And the extent and measure of the risk assumed by the company on the transfer being made was the measure and extent of the risk which it incurred in respect to the stock of goods originally insured, and is to be measured by the use or uses to which the building was originally appropriated under the policy, that is to say, the rate and degree of risk incident to a woolen factory in which wool and woolen goods are kept and manufactured in such a building as is described in the application and policy.

In every contract or policy of insurance against fire there is an implied promise on the part of the insured that he will not after it is made alter or change the insured premises, or alter or change the business then carried on, or to be carried on there, so as to increase the risk of loss by fire. And this is the rule of law, although there be no by-law of the company on the subject. And if the insured or his tenants so occupy or use the property insured at any time as to increase the risk of injury to, or loss of it by fire, the insured is not entitled to recover for it.

The application for the insurance, and on which the policy is issued, enters into and constitutes part and parcel of the contract of insurance, and is made such by the express terms of the policy itself: and from the application and the policy must be ascertained and determined the degree or extent of risk which the company assumes and agrees to insure against.

The origin of the fire or how it may have occurred is wholly immaterial, and is not a question to be considered in the case. If the insured or his tenants increase the risk of injury or loss to the insured premises from fire by any other use or uses to which it was at any time appropriated after the transfer of the insurance from the stock of wool, woolen goods, and materials which have before been removed from the building to the building itself, the

contract of insurance is vitiated and avoided by it, and no action can be maintained upon it.

THIS was an action of covenant on a policy of insurance with numerous special pleas, several of which were demurred to generally and specially on the ground that they simply alleged that the plaintiffs permitted the building insured by the policy to be used for purposes which materially increased the risk of loss upon it by fire.

Massey, for the plaintiffs: The pleas demurred to are defective and insufficient in substance as well as form, because they do not allege what the purposes were for which the plaintiffs permitted the building to be used, and which increased the risk of loss upon it by fire, as the defendants have averred in them.

Bates, for the defendant: General pleading is allowable when a multiplicity of matters constitutes the substance of the plea. And the substance of each of the pleas demurred to consist in brief of the material fact alleged in them that the plaintiffs allowed the building, whilst it was insured, to be used for other purposes than those for which it had been used and had been insured and which increased the risk of its destruction by fire; but the gist of the pleas and of the defense involved in them is that they thereby wrongfully increased the risk, and no specifications as to whom or for what particular purposes they had been allowed to be so used by them could add anything to the materiality of the pleas or was necessary to be alleged in them. 1 *Ch. Pl.* 535, 537. Besides, particularity is not required in the plea when the defense consists of matters of facts peculiarly within the knowledge of the other party.

Ridgely, for the plaintiffs: The defendants have pleaded this matter specially by way of confession and avoidance, and it must be alleged with sufficient certainty to apprise the plaintiffs of what they must be prepared to meet with their proof on the trial of the issue on the pleas in case they had been traversed.

By the Court: The demurrers to the pleas must be sustained.

As the pleas are special, the matter of defense relied on should be set forth with sufficient particulars and certainty to show upon their face *prima facie* that the purposes referred to but not stated, for which the plaintiffs permitted the building to be used, were such as would in fact, admitting the allegation to be true, have increased the risk of its destruction by fire. Judgment is therefore given for the plaintiffs on the demurrers.

The trial then proceeded on the other pleas and issues joined in the case. The policy of insurance was executed and delivered to the plaintiffs on the 22d day of August, 1865, for three thousand dollars, on a stock of wool, woollen goods, materials, etc., in their two-story brick factory with an iron roof in the town of Smyrna, and which insurance was afterward transferred by the company on the 22d day of January, 1868, from the stock of goods to the building itself at the instance of the plaintiffs and upon their representation that it was then empty, as they had a short time before that ceased manufacturing woollen goods in it and had removed their business from the town of Smyrna to the town of Milford. In their written application for the insurance, however, the plaintiffs in describing the building stated that the first story was used as a machine shop for the repair of machinery and very little shavings made. It was proved by the secretary of the company that the transfer of the insurance was so made by him with the sanction and approval of the president of it by indorsing the transfer on the policy and re-delivering it to the plaintiffs, because he did not consider the risk would be increased by it, and that he had done the like before, and it was a common thing and frequently done by insurance companies without consulting the directors; and the president proved that it had been the custom of the company to make such transfers in that manner when it could be done without any increase of risk. The building remained empty until the month of March, 1868, when the second story was rented by the plaintiffs and was used and occupied by the tenant as a carpenter shop, and who made doors and window frames and sash and planed boards in it until March, 1870, when the building was rented to two other persons who

used and occupied it as carpenters' and joiners' shop and carried on their business as such generally in it, manufacturing doors and door-moldings, window frames and sash, and planing boards for themselves and others, for which purpose they put and used a planing-machine, also a ticking-machine for moldings, and several circular saws in it, from which at times a very considerable quantity of shavings, sawdust, and other combustible materials would accumulate in it from such uses of it, until a few months before the destruction of it, when they converted it chiefly into a peach-basket factory and added a stave cutter and a surface planer to the other machines mentioned in it, and that they had been principally so occupied in using the building for some four months up to the Tuesday preceding the Sunday on which it was burnt, during which time there had been no work done or fire made in it to the knowledge of the tenants. It was totally destroyed on the 11th day of September, 1870. The premium note of the plaintiffs to the company was for six hundred dollars, and the rate of insurance on that was twenty per cent., and the premiums had all been paid up to January 22d, 1871. In proving their title to the property the plaintiffs offered in evidence the record of deeds for it in moieties from two vendors and tenants in common of it, from whom they had purchased it, one dated on 13th day of January, 1865, and the other on the 8th day of February, 1867, but recorded only the day before and without any U. S. internal revenue stamps upon them.

Saulsbury, for the defendant, objected for that reason to their admissibility in evidence.

Massey, for the plaintiffs. The record of them from the recorder's office of the county is evidence *per se* made so by express provision of the statute, and independent of that the court will presume that as a public officer the recorder has done his duty in recording them, and that the original deeds must have been duly stamped or he would not have recorded them. But all the acts of Congress on the subject of such stamps have since been absolutely repealed, and when these deeds were presented for recording there was no law whatever

requiring them to be stamped for that purpose, and if so, what right or authority had the recorder then to refuse to record them? Besides, it has been decided in this court that the Congress of the United States has no power to prescribe rules of evidence for the State courts.

Saulsbury: The reason the deeds were not recorded until yesterday was doubtless because they were not stamped, but the want of the stamps under the act of Congress, which was then in full force and effect, went to and was essential to the validity of the execution and delivery of them when they were executed and delivered. The court, however, would observe that the second deed was not made until long after this policy of insurance on the property was executed to the plaintiffs, which was issued on their declaration and representation to the company that they were then the owners of the whole of it, when they were in fact but the owners of one-half of it. And that in turn went to the validity of their policy.

The Court: We overrule the objections to the admissibility of the evidence offered, first, because the stamp acts of Congress referred to had been repealed when these deeds were recorded, and there was no law whatever to prohibit them from being recorded without them or to warrant or justify the recorder in refusing to record them; and, secondly, because the plaintiffs were at the time the policy was issued to them in possession of the whole of the property and as the lawful and rightful owners of it; and the objection, besides, at this stage of the trial can only go to the effect and not to the admissibility of the deed in question as evidence in the case.

The secretary of the company received due notice of the destruction of the building by fire and the loss occasioned by it in a letter from the plaintiffs on the 15th day of October and requiring the payment of their policy of insurance in consequence of it, and stated that by the direction of the president he wrote them a letter declining, when his statement was arrested by an objection from the counsel for the defendant that it was not competent for him to state the contents of the letter or to say more about it until the plaintiffs had produced it, or proved

the loss of it, to which the counsel for the plaintiffs promptly assented and disclaimed any intention of drawing from him such a statement. He also stated that the lowest rate of insurance charged by the company on carpenters' shops was two and a half per cent., and that it had but one, and had declined all other applications of the kind, and that its lowest rate on planing mills and sash factories was five per cent. And it was proved by an agent in Wilmington of fifteen insurance companies that their usual rates charged on woolen factories was one and a half per cent., on carpenters' shops three per cent., on planing mills and sash factories from six to seven per cent., and on peach basket factories the lowest rate was three and a half per cent. But the proof by other witnesses was that the manufacture of peach baskets by the tenants referred to in the building was attended with comparatively little danger from fire, as all the wood used in the making of them, except the boards for the bottoms, which were prepared and worked in a green state, and had to be steamed and put together while yet very damp or wet from the process, and no shavings of any amount or account in respect to danger from fire could accumulate in the building from such a use of it, and that the basket manufacture was carried on almost exclusively in the lower story. The origin of the fire was unknown.

Bates submitted a motion for a nonsuit on several grounds, and first, because the suit was brought before the cause of action accrued. The fire and destruction of the building insured occurred on the 11th day of September, 1870, and the action on the policy was commenced on the 19th day of October following, or in the brief period of just thirty-eight days thereafter. But on turning to the seventh and ninth sections of the charter of the company the court will find that it is provided that in case of loss or damage by fire to property insured the owner or person insured shall give immediate notice of it to the president or secretary at the office of the company, to the end that immediate inquiry may be instituted into it, and the company shall direct the proper appraisers to determine and value the loss actually sustained and make report within ten days

from the occurrence of the fire; and if the owner or person insured shall be dissatisfied with the estimate of the appraisers the question of damage or loss shall then be submitted to three disinterested persons chosen by the parties, whose award shall be final. And then, after providing how the amount of the loss for which such award shall be rendered shall be apportioned and raised among the members of this mutual insurance company in order to meet the payment of it, the seventh section further proceeds and closes with this provision: "And the damage or loss so awarded shall be paid within ninety days from the date of the fire or the company shall be liable to the payment of interest." The eighth section relates exclusively to and provides for the liabilities of the members individually to the company on their respective deposit notes in view of such contingencies; whilst the ninth section proceeds and is comprised in these words: "That the company may recover by suit from any of its members upon any of the liabilities enumerated in the preceding sections, and shall be liable also to a suit for any loss if the same be not paid within ninety days after due notification of such loss; and any member who is not individually interested in the suit shall be competent as a witness, notwithstanding his membership." Now, from these provisions it is manifest that the legislature in passing and the company in adopting the charter intended in every case of a damage or loss by fire of property insured under it the company should have immediate notice of it, and in the first place till ten days after the fire to institute the inquiry and direct the proper appraisers to ascertain and value the loss and for the return of their report upon it; and if not satisfactory to the insured that the matter should be referred to an amicable arbitration as directed in the provision; and in the next place, in addition to that, the company should have eighty days more from the date of the fire before it should be bound to pay, or be liable to be sued for the amount of the loss awarded by the arbitrators, subject to this qualification and condition only, that if it should not pay such award within ninety days from the date of the fire, it should be liable to interest on it from that date. That provision, however, applies only when that course of procedure has been

adopted by the parties in regard to the loss, but which was not done in this case. The subsequent provision, however, contained in the ninth section does not apply in this case, nor in any other case where no inquiry has been instituted and no appraisers have been directed in the first instance to determine and estimate the loss, and there has been no submission of the question of damages or loss to arbitration as specially provided for in the seventh section; but the ninth section, which is much broader and is general in its application and does apply in this case and all the other cases before stated, for after providing in the first place that the company may recover by suit from any of its members upon any of the liabilities enumerated in the preceding sections, it in the next place provides that it shall be liable also to a suit for any loss if the same be not paid within ninety days after due notification of such loss, not, as in the seventh section, and the cases instituted and proceedings under it in ninety days from the date of the fire, but in ninety days after due notification of the loss; and which would, of course, in most if not in all instances, practically exempt the company from any liability to be sued for the loss for a longer time in such an action as this than when the company has elected immediately on receiving the notice of the fire and loss to institute the inquiry and to resort to the mode of adjudicating the matter as provided for in the seventh section. But there had been in this case no proof even of a demand and refusal before the action was commenced, although it had been proved that due notice of the fire and loss had been given by the plaintiffs to the company in four days after the destruction of the building.

There were two other grounds on which he would also rest the motion for a nonsuit, and the next was the variance between the contract proved and the contract declared on in the case. The policy of insurance declared on is alleged to be the deed of the company, but it had not only been completely altered by parol in the most material part of it since its execution and delivery by the attempted transfer of the insurance from the stock of goods in the building to the building itself in such a manner, that is, by a written indorsement simply entered

on the face of the policy, but the president and secretary of the company had no power or authority to make such a substitution of the property insured by any such parol indorsement so entered in it after its execution and delivery, notwithstanding their opinions to the contrary expressed as witnesses on this trial. For it could only have been legally done by the surrender of the original and the formal execution and delivery of a new policy of insurance for that purpose. The authorities on this point had before been cited in this case in this court in the argument on the demurrer decided in it several terms since. *Hoffecker & Brother v. N. C. C. M. Ins. Co.*, 4 *Houst.* 311. The other and remaining ground was the failure of the plaintiffs to comply with the warranties on their part contained in the contract of insurance in this case between the parties to it, and which was disclosed in the evidence produced on their behalf to the effect that they were not the owners of more than one-half, if of any part of the property insured, when they filed their application for and obtained their insurance upon the faith of it, in which they declared that they were then the owners of the whole of the property.

Massey: There is no express provision in the charter that such a suit as this shall not be brought or instituted until ninety days after notice given of the loss. But even if the provision were as positive as that, still if there is any evidence before the jury sufficient to satisfy them that the company through its president and secretary refused or declined on the receipt of the notice to pay or adjust the loss with the plaintiffs, it constituted in law a waiver of the exemption of the company from liability to this suit for the ninety days as provided in the ninth section of the charter, and the action could be brought at any day within that time. *Phillips v. Protection Ins. Co.*, 14 *Mo.* 221; *Allegree v. Md. Ins. Co.*, 6 *Har. & Johns.* 408; *Strong v. Harvey*, 11 *E. C. L. R.* 112. And he was willing to leave that matter as a question of fact to be determined by the jury upon their recollection of the testimony of Mr. Smith, the secretary of the company, that he was directed by the president on the receipt of the letter from the plaintiffs notifying him of the

fire and loss and requiring the payment of the insurance to write to them a letter declining, or whatever it was he said, or the word or words used, or did not use in that connection to the best of their recollection. As to the second ground on which the nonsuit had been moved, it had already been sufficiently disposed of in the opinion of the court on the demurrer referred to by the learned counsel; whilst as to the third and last ground he would observe what he thought would be a sufficient answer to it, that there is a count in the declaration on the instrument as a policy of insurance executed and delivered on the day the transfer and substitution was made in the original policy, and when the plaintiffs were beyond all question the legal owners of the whole property.

Saulsbury: But if the testimony and statement of Mr. Smith, the secretary of the company, was as it had been represented by the learned counsel, it could not have the legal effect claimed for it under the charter of this company, which the proof of the demand and refusal had in the cases cited by him, for in each of those cases the question depended on an express condition incorporated in the policy of insurance itself by agreement of the parties, the breach of which on either side would excuse the neglect of it on the other, but here it exists not by agreement of the parties but by a positive provision of the charter, the fundamental law of the company. But our recollection by no means accords with his as to what that gentleman said. According to our notes and recollection of what he said he did not use the word declining or refusing or any synonymous term, but was stopped in his statement by our objection as soon as he had said that by the direction of the president he wrote a letter to the defendants.

The Court: The members of the court themselves are not agreed as to the extent or effect of Mr. Smith's testimony on the point in question, and as the counsel as well as ourselves differ in regard to it the majority of the court are not inclined to grant the motion, and as this is the only ground on which it has been rested about which we have any doubt or difference of opinion a nonsuit is refused.

Ridgely, for the plaintiffs: If the secretary of the company, and its agent for such purposes, had no authority to make the transfer and substitution of the insurance proved in the case, but the company afterward with the knowledge of it received the annual premiums on the policy, it was bound by the transfer so made by him. Any deed may be altered in the most material part of it by the consent of the parties. *Miller v. Stewart*, 9 *Wheat.* 680. When an empty building is insured, if there be no restriction in the policy as to the uses to which it may be applied, it may be appropriated to any to which such a building can be properly applied; and if it has a steam engine and machinery in it, as this building had, it may be used in any kind of manufacture in which a steam engine can be employed. It could not be used in the manufacture of gunpowder, nitroglycerine, or gun-cotton, but for any kind of manufacture in which the building and steam engine and machinery can be legitimately and properly employed it can be used without invalidating or affecting the policy of insurance upon it. But it is certainly clear and well-settled law in insurance cases that where there is no increase of danger to the building and of consequent risk to the company attending a change in the use of it, the validity of the policy cannot be affected by it. *Lattomus v. F. M. F. I. Co.*, 3 *Houst.* 404. And if there has been any increase of risk in consequence of a change in the use of it, and it is destroyed, it must be shown that the change in the use was the cause of its destruction to vitiate the policy, and where several changes have from time to time been made in the use of it, each increasing the risk, one in a greater and another in a less degree, and the building is at length destroyed, the same rule requires that it must be shown, even in such a case, that the use to which it was applied at the time of its destruction was the cause of it, although the use to which it was then applied may have been attended with less danger to the building than a preceding use to which it had been changed. And upon that principle it must be shown that it was the final change in the use of the building in question to the manufacture of peach baskets that increased the danger of its destruction from fire and the risk thereby incurred by the company when

they insured it as a woolen factory, and also that it was that use of it which caused its destruction. But the proof as to that was clear that it could not have increased the liability of the building to take fire from the nature of the material employed in the manufacture of such baskets and the state in which it had to be used, consisting principally of green gum and the steamed and wet condition in which they had to be put together when the baskets were made, and, of course, the refuse, which was but small, accumulating in the building from the work would be in the same state, and was so green and damp that it could not be used even for kindling fires, according to the testimony in the case. Of what weight or value then could be the testimony of the agent of fifteen insurance companies that the relative rate and risk of insurance on woolen and peach-basket factories compare as one and a half to three per cent., and on carpenter shops that it is only one per cent. greater than on such basket factories? What could such an agent or the companies he represents know about such factories? The charter required that the plaintiffs should have given the company immediate notice of the fire and loss, which they did in four days after the occurrence, and which was sufficient under that provision. *Fland. on Ins.* 512, 513. And the letter containing the notice contained a demand on it for the amount of the insurance, which the company refused to pay, as we contend according to the evidence before the jury. And that it refused and intended to refuse to pay it, and considered that it had done so when it replied to their letter through Mr. Smith, the secretary, is perfectly manifest, and should be inferred from the fact that the company did not do what it was its duty by the charter to have immediately done on the receipt of the notice, if it had intended to do otherwise, and that was to institute the inquiry into the loss as provided for in the seventh section of it.

Bates: All the provisions of the charter which had been referred to clearly indicate that the intent of the act was to provide that in no case whatever should the company be required to pay or be liable to be used for the amount of the insurance

until ninety days after due notification of the fire and loss, except in cases in which the company might deem it proper to institute the inquiry and the amicable proceeding for the adjustment and settlement of the claim as provided for in the seventh section, and even then and in such case that it should not be obliged to pay the amount awarded until ninety days from the date of the fire. And this was a peremptory condition imposed by the terms of the charter in favor of the company upon every member of it who by his improper conduct had forfeited in the opinion of the company his right under the contract of insurance to sue it on his policy whenever he should be placed in that relation to it; and it was according to the obvious meaning and intention of the charter that such a peremptory condition was imposed upon him for the protection and security of the company in such a case as could not in accordance with the spirit and design of the law be waived or renounced by the company. But if it could in law be waived nothing short of the strong and conclusive evidence that the company absolutely refused to pay it on due notice of the loss and demand made would be sufficient to prove it. It was proved in the evidence that on the 2d of September, 1867, the company increased the rate of insurance on sash factories and saw mills to four per cent., of which the defendants must be deemed in law to have had knowledge, as it is a mutual insurance company and every person insured in it is a member of it. *Lattomes v. F. M. F. Ins. Co.*, 3 *Houst.* 404; *Diehl v. Adams Co. M. Ins. Co.*, 58 *Pa.* 443. And the last case cited is authority for the principle that having rented the building to be used as a sash factory after that rate had been established was itself an increase of risk known to the plaintiffs which forfeited their policy; and also for the principle that a waiver by the company of the forfeiture never occurs unless where it is intended, or the act relied on for the purpose by the other parties, ought in equity or justice to estop the company from denying the waiver. The application of the plaintiffs for the insurance and the representations made and the description of the building and the use to which it was applied contained in it being referred to in the policy issued upon it, constitute, of course, in law a part of the

policy and of the express terms of the contract of insurance between the parties, and not only a warranty on the part of the plaintiffs for the present, but also for the future; or, in other words, that the use will not be afterward changed so as to increase the hazard of the insurance, and that the property will not be altered in any respect, either in its structure or its uses as it is represented in the application, so as to produce that effect. 2 *Pars. on Contr.* 424; 26 *E. L. & E. R.* 238. And as no new application was filed and no change or alteration whatever was made in that on which the policy was issued, how could the substitution of the empty building for the woolen goods, wool, etc., then in it and the transfer of the insurance be made by a parol indorsement entered merely in the body of the policy afterward without any written application for such alteration, or any alteration in that already filed?

Saulsbury followed on the same side. *Massey* closed the argument before the jury.

The Court, Gilpin, C. J., charged the jury: That the case was to be considered and decided by them according to the evidence which had been submitted to them in the trial of it, and in the same manner as if it were a suit between natural parties, and not between two respectable but unfortunate citizens of their county and a wealthy corporation which had been created by the legislature of the State for wise and beneficent purposes. That the charter of the company contained provisions which expressly exempt it from any action on a policy of insurance for a loss by fire for ninety days from the date of the fire, and after due notification of the loss occasioned by it, and of which the person injured is required to give immediate notice to the president or secretary at the office of the company. In this case the fire occurred and the brick factory of the plaintiffs', the building insured, was destroyed by fire on the 11th day of September, 1870; in four days thereafter, on the 15th day of that month, notice of the fire and loss was given by the plaintiffs to the proper officer of the company, and on the 19th day of October, 1870, this suit was instituted by them to recover for the loss, or within less than ninety days after the occurrence of it. And

the first question presented for consideration in this case under the facts proved has been whether the action was not commenced prematurely or too soon and before the company was liable under the charter to be sued for it; and the proper answer to this inquiry will depend upon the determination of the question of fact which has been presented for the consideration and decision of the jury upon the evidence of Mr. Smith, the secretary of the company, in regard to the letter which he stated he was directed by the president of it to write to the plaintiffs in reply to their notice of the fire and loss and their claim for the amount of the insurance. The learned counsel for the parties respectively, as well as the members of the court, differ in their recollection as to the words used by him and the substance and effect of his statement in relation to the matter, and which was objected to and arrested by the counsel for the defendants before it was completed by him. The counsel for the plaintiffs contend that his evidence was that he was directed by the president to write such a letter to the plaintiffs declining (that is, to pay the claim), when he was so interrupted and stopped from saying more on the subject; while the counsel for the defendants on the other hand insisted that he did not utter the word *declining* or any equivalent expression, but was stopped as soon as he had said that he was directed by the president to write a letter to the plaintiffs. It was, therefore, a question of fact in the case between the counsel for the jury to decide, and it would be their duty to determine from their own recollection of his testimony what he said on that as well as other matters in the case. As it is a well-settled principle of law, however, that a party to a contract may voluntarily waive any condition or limitation of it in his own favor or even a forfeiture of it, and also any privilege or exemption conferred upon him by it if he chooses to do so, and this may be sometimes done by implication as well as expressly or directly, it is the duty of the court to say to the jury that if they should be satisfied from the evidence which they had heard in the case that the defendants had at any time before the commencement of the suit expressly refused or declined to pay the insurance on the claim or demand of the plaintiffs after the loss and destruction

of the building by fire, it would constitute in law a waiver by the defendants of their privilege and exemption from liability to be sued for it until ninety days after the fire and loss and their due notification of it by the plaintiffs. And if such was the fact in this case then they waived the credit of the ninety days and the suit was not commenced too soon, but the action could be maintained notwithstanding it was commenced before the ninety days had expired. If, however, such was not the fact, and the defendants did not refuse or decline to pay the insurance to the plaintiffs before the action was instituted, then it was instituted prematurely and the plaintiffs could not recover.

The policy of insurance is dated and was issued on the 22d day of August, 1865, on a stock of wool, woolen goods, materials, etc., in a two-story brick factory of the plaintiffs, in the town of Smyrna, and the insurance, which was for the sum of three thousand dollars, was afterward duly transferred on the 22d day of January, 1868, by the agreement of the parties, from the stock of goods to the building itself, the first story of which, as was stated in the application for the insurance, was used as a machine shop for the repair of machinery and very little shavings made in it. But this transfer of the insurance from the stock of goods to the building or factory did not in any respect vary or affect the terms of the policy or the application beyond the mere fact of transferring the insurance from the goods to the building; for it did that and nothing more. The class of risk, that is to say, the insurance and extent of the risk assumed by the company on the transfer being made, was the measure and extent of risk which it incurred and which existed in respect to a brick building, used as a woolen factory, with the first story used as a machine shop for the repair of machinery and where very little shavings were made. And this risk under the policy is to be measured by the use or uses to which the building was originally appropriated. But it is contended on behalf of the defendants that the plaintiffs or their tenants to whom they subsequently rented the building after they had removed their stock of wool, woolen goods, and materials from it to their factory in Milford, changed and increased

the risk of loss by fire, by the change which was made in the character of the business carried on in it. The proposition of the defendants is, and they so insist, that they so assumed only the degree or rate of risk incident to a woolen factory where wool, woolen goods, and materials are manufactured and kept and the first story of which is used as a machine shop for the repair of machinery and where very little shavings are or were to be made, and that they assumed no risk beyond that. The court considered this proposition to be correct and that it ascertained and determined the degree and magnitude of the risk assumed by them and against which they agreed to indemnify the plaintiffs in this case under the policy and transfer of insurance in question, for they did not undertake by their policy of insurance to insure the brick factory when the transfer of insurance was made to it against any greater risk than that which has just been indicated. The question then is, and which was purely a question of fact for the consideration and decision of the jury, did the plaintiffs or their tenants so occupy or use the premises at any time as to increase the risk of injury or loss of the building by fire? If they did so increase the risk they were not entitled to recover, for the law on that subject was very plain and well settled as well in this State as elsewhere in the States of this country and in England. That law declares that in every contract or policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not after the making of the policy alter or change the premises or alter or change the kind of character of business carried on or to be carried on there, so as to increase the risk of loss by fire. And this is the rule of law, although there be no by-law of the company on the subject.

The application, as it is called, for the insurance and on which the policy is issued enters into and constitutes part and parcel of the contract of insurance and is made such by the express terms of the policy itself; and from this and the policy must be ascertained and determined the degree or extent of the risk which the defendants assumed and agreed to insure against. And in consequence of this the description of the building contained in the application and the fact stated in it that the

first story of it was then used as a machine shop for the repair of machinery and little shavings made became a material part of the contract and policy of insurance in this case, and constituted an express and essential limitation and restriction in respect to the making of shavings in the building. The plaintiffs ceased to manufacture woolen goods in it in the latter part of the fall of 1867, and removed with their woolen machinery to their factory at Milford, after which the building remained empty for a time, but in March, 1867, Mr. Smith became the tenant of the second story of it and occupied and used it as a carpenter's shop and so continued to use it for a period of two years. In March, 1870, Mitchell & Weddle occupied and used the building for the purpose of general carpentering work, manufacturing doors, windows, window frames, sash, and the preparation of woolen building materials generally and afterward as a factory for the making of peach baskets; and one of the witnesses stated that he had seen more shavings in the building during the time it was so occupied and used than could have accumulated in it he thought in one day merely. Now, although the insured, the plaintiffs in this case, or their tenants might lawfully change or alter the premises or appropriate them to purposes other than the manufacture of woolen goods and materials, yet they were bound in law to be careful not to so change or alter it or to occupy or use it for any other purpose or purposes which would increase the risk or danger of injury or destruction by fire. And therefore if either the insured, the plaintiffs, or their tenants in fact increased that risk or danger by any of the other and subsequent uses or branches of business to which it was at any time appropriated by them after the transfer of the insurance to it, the contract of insurance was vitiated by it and was thereby rendered void and no action would lie upon the policy of insurance for the loss sustained in this case. But if such change of use or business, or the manner of conducting such other and new business by them, or any of them, did not in any material degree or respect increase such risk, then the contract and policy of insurance would continue valid and in full force and effect.

There has been much speculation indulged in by counsel in the course of the trial as to the manner in which the fire probably occurred, but the origin of it is wholly immaterial and is not a question to be considered in the case. The main fact to be ascertained and determined by the jury was whether the risk of loss by fire of the two-story brick factory was increased after the 22d day of January, 1868, the day when the insurance was transferred from the stock of goods, etc., to the building. It makes no difference when the fire occurred, or what cause originated it. If the risk of loss by fire was increased after that time by reason of any of the changes, before suggested by that fact and circumstance alone and at that very instant the policy of insurance was forfeited and rendered null and void.

After being out several hours, the jury, not being able to agree on a verdict, were discharged.

R. Harrington, Ridgely, and Massey, attorneys for the plaintiffs.

Bates and Saulsbury, attorneys for the defendant.

EDWARD BECK *v.* THE BANK OF SMYRNA.

In advertising the sale of lands on a mortgage it has long been the well settled practice, and uniformly recognized by our courts, for the sheriffs in this State to follow the description of the lands contained in the mortgage.

RULE to show cause wherefore the sale of the plaintiff's lands by the sheriff on several writs of *levari facias* at the suit of the bank against him should not be set aside. The several parcels and tracts of land sold were included in four several mortgages from the plaintiff and his wife to the bank, and were grouped together and designated and described in the respective levies and advertisements of the sales on the four several writs of *levari facias* in the language in which they were designated in the respective mortgages on which the writs were issued, and

the ground for setting aside the sale alleged in the affidavit was that they sold at the sale for a grossly inadequate price, for the following among other reasons: that much of it was sold in mass whereas it should have been sold in separate allotments, which was not only practicable but quite convenient with reference to several portions of them, namely, two pasture lots in the town of Smyrna, adjoining each other, containing two acres each, and sold together for one hundred and forty-nine dollars per acre, but were worth each of them separately at least two hundred and twenty-five dollars per acre, and would have sold separately for that much. They were divided from each other by a good post and rail fence. "The John M. Denning Lot," described and sold as one lot on Main Street in the same town, fronts on that and another street, consists of seven tenement houses rented to as many families, each house and curtelage separated from the one adjoining by a substantial fence and entirely independent of each other. "The One Acre Griffith Lot" on the same street, and advertised and sold as one lot, consists of four lots and four two-story comfortable dwelling-houses suitable for four respectable families, and each has a small garden attached, and the lots are separated from each other by good substantial board or pale fences between them. They are rented for three hundred dollars per annum, and are well worth three thousand dollars, but were sold *en masse* for one thousand seven hundred and fifty dollars. "The James L. Bewley Lot" sold as one but is in fact two lots, each having a brick storehouse on it and rented to two separate merchants, and are separate and distinct in their interior structure from the garrets to the cellars, and their only connection is that they adjoin each other. While these lots were selling the plaintiff requested the counsel in the writ for the bank who was present conducting the sale to sell them separately, but he declined and said they were together in the mortgage and had to be sold together under it. They sold for four thousand two hundred dollars, but were worth at least six thousand dollars. "The Delaware Street Lot," described and sold as one lot and premises, consist of three lots, three dwelling-houses rented and occupied by three families, of which one rents for one hundred and eighty dollars and each of

the others for one hundred and ten dollars per annum. They sold together for two thousand six hundred and seventy-five dollars, but were worth at least five thousand dollars. They are good brick houses with pressed brick fronts and eligibly located, but are subjected to an annual ground-rent of thirty dollars. The house and lot on Main Street described in the advertisement as occupied by the defendant in the writ sold for three thousand five hundred dollars, but cost seven thousand dollars, and he was offered for it in 1874 six thousand dollars. The lots with the seven tenements on Main Street sold for one thousand eight hundred dollars, but were worth two thousand five hundred dollars; the two pasture lots for five hundred and seventy-six dollars, but were worth nine hundred dollars; that the farm sold for ten thousand two hundred dollars, but had paid for several years and up to the present year the interest on thirty thousand dollars; and that the description of the lands in the advertisement was very defective, etc.

Fulton, for the plaintiff in the rule, proposed to cite adjudged cases in the courts of Pennsylvania and New Jersey that a sale of lands sold in such a manner by a sheriff in either of those States would be unhesitatingly set aside by their courts.

But the Court declined to hear them read, and remarked that the practice had been well settled for fifty years and more, and had been repeatedly and uniformly recognized in the courts of this State, for the sheriff when selling lands on a mortgage or on mortgages, as in this case, to follow the description of them contained in the mortgage in his levy and advertisement of the sale of them.

Massey, for the defendant in rule, then observed that such he had always understood to be the practice in such cases in this State. That the grouping and descriptions of the lands as contained in the respective mortgages had been supplied by the mortgagor himself preparatory to the drawing of them; but if timely application had been made by him or his counsel to the

bank or its counsel for that purpose, they would have cheerfully consented to have had the property advertised and sold in just such separate parcels and allotments as might have been most agreeable to his wishes and interests in the matter. But nothing of the kind was even suggested until the day of the sale and after it had commenced, and then only with reference to the sale of the two brick stores.

The rule discharged.

WILLIAM HOMEWOOD, defendant below, appellant, *v.* THE MAYOR AND COUNCIL OF THE CITY OF WILMINGTON, plaintiffs below, respondents.

An ordinance of the city of Wilmington prohibiting any person occupying or using any land or building for the purpose of producing or preparing beef, mutton, lamb, veal, or pork for sale or market, from selling or exposing the same for sale on the streets or sidewalks of the city, but providing that it shall not apply to any farmer, unless such farmer shall exercise the business of farming for the purpose of producing or preparing beef, mutton, lamb, veal, or pork for sale or market, does not apply to a farmer selling or exposing to sale on the streets of the city mutton produced and prepared on his farm for sale and market, unless it appears that he was at the time exercising the business of farming for that purpose.

APPEAL from the judgment of a justice of the peace in the city, imposing a fine on the appellant for selling mutton on the streets of the city contrary to an ordinance of it. The substance of the ordinance was that no person exercising the business of a butcher or shinner should sell or expose to sale any beef, mutton, lamb, veal, or pork at any place on the streets or sidewalks of the city under a penalty of not less than five nor more than ten dollars; provided, that it should not apply to stands or stalls within it for the exclusive use of butchers. And that any person occupying or using any land or building for the purpose of producing or preparing beef, mutton, lamb, veal, or pork for sale or market should be deemed a shinner or butcher within the true intent and meaning of the ordinance; provided, that nothing in it should be held to apply to any farmer, unless

such farmer should exercise the business of farming for the purpose of producing or preparing beef, mutton, lamb, veal, or pork for sale or market.

The appellant's father, with whom he lived, was the owner of a very valuable farm in the country consisting of near three hundred acres situated in the vicinity of Newark, and distant ten or twelve miles from the city, on which he resided and which he cultivated uniformly and quite largely in wheat, corn, oats, and hay, and other agricultural products grown on farms in that section of the county, and on which he usually kept a flock of about one hundred sheep of superior stock, and lambs, some of which he had several times sold at highly remunerative prices to other farmers and sheep-growers on account of their improved breed and strain. Some of his sheep, however, had from time to time been slaughtered on the farm, and the appellant, his son, by his direction had on several occasions taken the mutton for sale to Wilmington and sold it on the streets and near the sidewalks of the city, and it was for such a sale the proceeding below had been instituted and the judgment in it had been rendered against him in the case.

Higgins, for the plaintiffs below, asked the court to charge the jury that if the appellant was engaged in the business of farming on his farm, large, valuable, fertile, and productive as it might be, and had been described to be by some of the witnesses, but had raised and slaughtered on it and sold on the streets of Wilmington any number of sheep in the mode and manner interdicted by the ordinance, and in so doing had carried on the business of farming upon it for the purpose in part, or to any extent of producing or preparing for sale or market the mutton which by his direction had been sold by his son on the streets of the city in the manner proved and admitted by him in his testimony, however incidental or subordinate it might have been in its nature or amount, either to the general business of farming carried on or the more important and profitable purposes for which it was carried on by him, he was guilty of a violation of the true intent and meaning of the ordinance in question.

Lore, for the defendant: As to the true intent and meaning, although the proper legal construction was by no means clear, the indirect design and purpose of it he thought was obvious, and that was to secure by city legislation a monopoly in the trade to which it relates to the butchers of Wilmington at the expense of the farmers in the county who reside near enough to attend its markets, and as such it was in derogation of the common law and the rights of the people of the city as well as of the farmers referred to, and it demanded and should receive from the court a strict construction in the interpretation and application of it in any case, strict as to what shall constitute the offense alleged as a violation of it, and more particularly so since it was not only an illiberal and impolitic prohibition, but because it was penal in its character. The respondent, however, was not a farmer and therefore did come within the terms or the meaning of the ordinance, while his father, whose agent he was in the matter complained of, had been called and examined as a witness on the other side, had expressly stated that he did not exercise or carry on the business of farming for the purpose of producing or preparing mutton for sale or market, although a few of his sheep were slaughtered and sold when the butchers would not buy them at prices at which he could afford to sell them, as well and truly he might say of such a farm as he owned, of over two hundred and seventy acres, with a flock of not more than a hundred and twenty sheep at any time upon it, of the best and most improved breed, and which were both too valuable and too costly to be sold and sacrificed in the form of mutton, as any purpose of his in either buying or raising them, and much less as any purpose of his in exercising the general business of farming on it upon the large scale on which that business had so long been carried on by him.

Higgins replied.

The Court, Gilpin, C. J., charged the jury: That it appeared from the testimony of Mr. Hawkins, the clerk of the market, that the proceedings in the case had been instituted at the instance and upon the complaint of the butchers of the city, from

which it might be reasonably inferred that they were principally, if not the only persons who were to be benefited by the ordinance and the enforcement of it. But although it was in that aspect of it in derogation of the common law and the common right of the citizen, the power conferred by the charter on the city council to establish ordinances for the regulation of such business within the limits and on the streets of the city was a police power, and every ordinance should receive a reasonable interpretation so as best to subserve the purpose and promote the object, that is to say, the true and legitimate purpose and object for which the power to establish the ordinance was granted in the charter.

The words of the ordinance in question were peculiar, and certainly they do not clearly and unquestionably convey the idea or the meaning claimed for them by the counsel for the respondents. In the first place, it declares, so far as it is now necessary to notice its language, "that any person occupying or using any land or building for the purpose of producing or preparing beef, mutton, lamb, veal, or pork for sale or market, shall be deemed a shinner or butcher," and in the next place, that this vague and general definition shall not "apply to any farmer unless such farmer shall exercise the business of farming for the purpose of producing or preparing beef, mutton, lamb, veal, or pork, for sale or market." And it was under these latter words that the appellant was charged as the agent of his father, or rather the father as his principal, with exercising the business of farming for the purpose of producing or preparing mutton for sale or market, and selling it on the streets of Wilmington contrary to the ordinance. And when we come to learn the size of the farm, the scale on which the appropriate and general business of farming is carried on upon it, and the value and importance of the several and usual farming purposes for which it is carried on, and the limited number of sheep kept on it and the insignificant amount of mutton produced on it and sold from it, we cannot conceive how it can reasonably be said or believed that such a farmer is exercising the business of farming for such a purpose. So far as it is intended to apply to farmers, the violation of the ordinance

does not consist at all in the business simply for the purpose of producing or preparing mutton for sale or market, but in exercising the business of farming for that purpose. And what did that word *purpose* in that connection import? It had a well-established meaning and signification in our language and was properly defined to be that which a person sets before himself as an object to be reached or accomplished, the end or aim to which the view is directed in any plan, measure, or exertion; 2, intention, design; 3, end, effect, consequence; 4, of purpose, on purpose, for the purpose, that is, with previous design.

If, therefore, the jury believe from the evidence that the appellant and his father were exercising the business of farming for the purpose of producing or preparing mutton for sale or market at the time when the appellant sold the mutton as alleged on the streets of Wilmington, he was guilty of a violation of the ordinance in question, but if they did not so believe from the evidence, he was not guilty of a violation of it.

Verdict, not guilty.

THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY v. THE KENT COUNTY RAILROAD COMPANY.

If a railroad company incorporated and organized under an act of the legislature of Maryland to build a road in that State, afterward obtains a special act of incorporation of it by the legislature of this State for the purpose of extending the road into this State, but subsequently abandons the design and does nothing under the act, it will not become a corporation of this State or be exempt from our writ of attachment against foreign corporations.

RULE to show cause wherefore a writ of foreign attachment issued at the suit of the Philadelphia, Wilmington and Baltimore Railroad Company against The Kent County Railroad Company, and laid in the hands of William Wilson, garnishee, should not be quashed.

Gray, for the plaintiff in the rule: The ground alleged and on which the rule to show cause had been granted, was that The Kent County Railroad Company was duly incorporated by a public act of the legislature of this State, as well as by an act of the legislature of the State of Maryland, and was therefore a domestic corporation, existing as such by a law of this State and not a foreign corporation, and that it was consequently not subject to a writ of foreign attachment issued out of this court. Our statute in relation to the writ of foreign attachment against foreign corporations provides that the "writ of foreign attachment may be issued out of the Superior Court of this State against any corporation, aggregate or sole, not created by or existing under the laws of this State, upon affidavit made by the plaintiff or any other credible person, and filed with the prothonotary of said court, that the defendant is a corporation not created or existing under the laws of this State, and is justly indebted to the said plaintiff in a sum of money, to be specified in the affidavit, and which shall exceed fifty dollars." This comprises the first section of the statute, and there is nothing following it which in any manner qualifies or varies it. *Rev. Code Amend.* 642. The Kent County Railroad Company, which had in the first place been incorporated by an act of the legislature of Maryland, was also afterward incorporated by the same name by an act of the legislature of this State, passed on the 16th day of March, 1865. *Del. Laws, Vol. 12, p. 635.* And although it was not stated in the enacting clause, as is usual in acts of incorporation, that it was enacted with the concurrence of two-thirds of the members of each branch of the legislature, the omission did not impair or effect the constitutional validity of it. *Sedw. on Stat. and Cons. Law* 533, note a. For it is presumed to be constitutional unless the journals of the two houses or one of them shows the contrary affirmatively. 13 *Wend.* 325. And as there was no provision in the act which either directly or indirectly required the stockholders of the company to expressly assent to or accept it, it was a matter of legal presumption that they did in fact assent to and accept it, and as it was also to be presumed that it was for their benefit and advantage. *Ang. & Ames on Corp.* 52; 12 *Wheat.*

70. And more particularly it is so to be presumed in this case, inasmuch as it is expressly recited in the preamble to the act as a reason for the enactment of it, that the company desired to extend their railroad within the limits of this State, so as to connect it with the Delaware Railroad, and to obtain authority therefor from the General Assembly of this State; and for which purpose it delegates to the company a portion of that high and supreme State prerogative and dominion over the territory of it, termed the eminent domain of the State, for among other powers it confers upon the company the authority to condemn as well as the right to purchase and hold land in this State so far as it may be needed for the uses and objects of it. A corporation is considered as an inhabitant of the State in which it is incorporated; and where, as is sometimes the case, a corporation is chartered by two or more States, it is a domestic corporation in each of them. *Drake on Attachments, sec. 80.*

Gordon, for the defendant in the rule: The State could not force a charter on any company. In all private or joint stock corporations the charter constitutes a contract between the State and the company, and could only be made with the consent of both parties. And therefore it must be shown that the act of incorporation passed by the legislature of this State was accepted and adopted by the company either by a formal or express resolution or declaration to that effect by the stockholders of it, or by some positive act done or practical step or proceeding taken under the provisions of it by the company since the passage of it as far back as the year 1865, that would unequivocally indicate and imply at least that it had thereby in effect assented to and accepted and adopted it. But no such proof as either kind had been or could be produced in the case. *Ang. & Ames on Corp., sec. 41.*

Houston, J., delivered the opinion of the court: The party plaintiff in the rule, The Kent County Railroad Company, was originally incorporated by an act of the legislature of Maryland in the year 1856, and afterward by a further act altering and amending it passed in the year 1864, to locate and construct a

railroad from the waters of the Chesapeake Bay or some point on Chester River through Kent County, in that State from which it derived its corporate name, to the boundary line of this State, as appears by the preamble to the act now in question, passed by our legislature in 1865, to incorporate the company in this State also for a particular and specific object in connection with the road to be constructed by it in that county, as further appears from another recital in the preamble and which is as follows: "And whereas, the said Kent County Railroad Company desire to extend the said railroad within the limits of this State so as to unite the same with the Delaware Railroad at some point on the line of said railroad not more than four miles from the place called Townsend, and to obtain authority therefor from the General Assembly of this State." And which is the only reason assigned by the company or the legislature for the enactment of it.

According to the evidence, the company was organized under the acts of the legislature of Maryland, and it could not have been otherwise, since the act of this State makes no provision whatever for the organization of it, as is usual in such acts, but being merely subordinate and supplementary in its nature and purpose to the Maryland acts, and evidently assuming that it had been or would be organized under those acts, it proceeds in the first section to incorporate "the subscribers to the stock of the company, their successors and assigns," by the same name and by that name to have perpetual succession and to be capable in law of purchasing and holding, leasing, mortgaging, and selling, both real and personal estate, to sue and be sued, to make and use a common seal, and to ordain and enforce such by-laws and regulations as they should deem necessary for the government of the corporation, and generally to do all and singular the matters and things and exercise and enjoy all the rights, powers, and privileges properly appertaining to the well being and ordering of the same. By the second section, however, the more definite and specific power is conferred on the company to extend and construct their said railroad within the limits of this State from the point on the line dividing it from the State of Maryland where it should be located by the said company to

the Delaware Railroad at any point not more than four miles from the place called Townsend on said railroad which they might deem advisable and by such route or routes as they might deem most eligible, while all of the powers, rights and privileges conferred by the succeeding sections and provisions of the act have reference only to this special franchise and this specific object of it and which are wholly incident to and depended upon it, and to that portion of the said railroad which was to be extended and constructed within the limits of this State pursuant to the provisions of it. And if any doubt can arise from the broad and general terms employed in the first section as to this constituting in point of fact the paramount and controlling object of the act of incorporation by the legislature of this State, we may have recourse also to the recital in the preamble before stated to so restrain and explain them. 1 *Kent's Com.* 461; *Crespigny v. Wittenoom*, 4 *T. R.* 790. And it must therefore be so considered and construed by us.

It is a fact, however, admitted in the case that, owing to the objection of the Delaware Railroad Company to the location and extension of the road by the route then contemplated by the legislature and the company, so as to connect it with the Delaware Railroad at or near Middletown in this State, no part of it has in fact been located or constructed within the limits of this State; and since for that and other reasons it has not in fact been located and constructed, even in Kent County, Maryland, in the direction of the boundary line of this State any further than to Massey's Cross Roads in that county, from which point, pursuant to an agreement between the two companies, a branch railroad has since been constructed by the former company to the Delaware Railroad at Townsend in this State, and which is now leased to and operated by the latter company, and that it has been so made and constructed according to the understanding of the parties to the agreement, in lieu of that portion of the Kent County Railroad which it was then contemplated and intended to have located and constructed to the boundary line and extended and constructed within the limits of this State as indicated and provided for in it, we are bound to consider and conclude that this necessarily constituted in its legal operation

and effect as an absolute renunciation, not only of their original intention to so extend it, but also of their power to do so under this act without further legislation in this State to authorize it. For the connection of the Kent County Railroad with the Delaware Railroad at Townsend having since been made in the manner stated by agreement between the companies and pursuant to the powers which they possessed for that purpose, has by such substitution superseded the location, extension, and construction of it as specially provided for in this act, and with it the power and authority granted in it for that particular purpose and no other. And furthermore we may remark that it does not appear that the company has ever done anything under the provisions of this act to avail itself of the benefits of it, although ten years at least have elapsed since the passage of it. Besides, it appears that it has never been expressly accepted by the company; and notwithstanding there is no provision in it requiring such an acceptance, and although it has been held in other cases that grants beneficial to corporations as well as to natural persons may be presumed to have been accepted from their action under them, and that in a majority of instances, perhaps, it is rather to be inferred or presumed from the course of conduct of the company afterward than to be expected to be proved by an express act or resolution to that effect, it is manifest from what we have already stated that nothing has been done by the company under this act to constitute even an implied acceptance of it in this case. 1 *Redf. on Railways* 69; *Charles River Bridge v. Warren River Bridge*, 7 *Pick.* 344; *Bank of the United States v. Dandridge*, 12 *Wheat.* 64. Indeed, the fact that the company has built no part of the railroad authorized by and provided for in this act, but so much of it as it afterward concluded to construct has been built in Kent County, Maryland only, and, of course, exclusively under the authority of the laws of that State, absolutely negatives, we think, such an implication.

But we may go further and say that a mere act of incorporation cannot of itself create an existing corporation in point of fact under the laws of this or any other State. The act does not create the corporation but simply authorizes and provides

for the formation of it, and it must afterward be organized and established pursuant to the provisions of it to give it any life or existence in fact as a corporation; and until it is so indued with such an organic life or existence the act itself remains practically and in effect but a dead letter. And until the future company authorized and provided for in the act has been duly formed and organized as provided for in it, the corporation to be instituted cannot properly be said to be created or in existence. And, therefore, strictly and literally speaking in the words of our statute in regard to foreign attachments against corporations, *Rev. Code Amend.* 642, cannot properly be said, perhaps, to have been either created or organized and existing under the laws of this State or the act now in question, but solely under the laws of Maryland previously enacted and which properly provided for the creation and organization of it, whilst it was merely recognized as a corporation already created, organized and existing in that State under the acts referred to in the preamble of this act, then to be sanctioned and recognized under the act of this State, for it simply incorporates as we have before observed, the "subscribers to the stock of that company, their successors and assigns," under the same name and without making any provision whatever for the organization of the company under it in this State. But independent of this strict construction of the words of our statute, which are as follows, "a writ of foreign attachment may be issued out of the Superior Court of this State against any corporation aggregate or sole not created by or existing under the laws of this State, etc.," nothing has ever been done under this act and it has never been in fact accepted either in express terms or by implication by the Kent County Railroad Company, while it certainly has been created and duly organized and established as an existing corporation under the laws of Maryland in the county of Kent in that State, where its president and other officers now reside and always have resided, and where its principal office and place of business is situated and its corporate residence must be considered to be. What ground then can there possibly be for holding under all these facts and circumstances that it is not a foreign, but a domestic corporation of this State within the true and proper meaning of

the words of our statute? We think there is none and the rule must therefore be discharged.

JOHN W. GRAY *v.* GEORGE H. VANDYKE.

The record of a judgment rendered by default on a summons returnable forthwith for want of appearance should state that it was made returnable forthwith, because the justice was satisfied by the oath of the plaintiff or otherwise, that there was danger of his losing the benefit of his process by delay.

CERTIORARI. The record stated that a summons was issued for the appearance of the defendant forthwith, and judgment was rendered against him by default for want of appearance, but not that the justice was satisfied by the oath of the plaintiff or otherwise that there was danger of his losing the benefit of his process by delay, and which was assigned for error in the case.

The Court reversed the judgment.

SUPERIOR COURT.

SPRING SESSIONS.

1876.

JOHN S. ROWBOTHAM *v.* BENJAMIN C. PEARCE.

A general demurrer to a count in a declaration in an action on the case alleging that the defendant, being the owner of a certain messuage with the premises, demised the same to the plaintiff for one year, with the exception of three rooms in it, which he retained for his own use and occupation, in pursuance of which the plaintiff with his family entered into possession thereof and continued to occupy the same for three months, but that from the time of his so entering into possession of them up to the time last mentioned he and his family and persons visiting them had been so much annoyed and disturbed by gaming, unseemly sports, uncouth noises, profane and obscene expressions in the portion of the house reserved and occupied by the defendant, often continued and kept up until a late hour of the night, that he was constrained and obliged to remove therefrom with his family at the time last mentioned, and was thereby subjected to great trouble, inconvenience, and expense in removing his family and furniture therefrom, and in procuring and renting another house, admits all the material facts alleged in the count, which as thus alleged in the count and admitted by the demurrer constitute in law a case of constructive eviction of the plaintiff from the demised premises, as the result of the wrongful acts and conduct of the defendant, and *prima facie* import an indirect injury for which the action on the case will lie.

The facts alleged in other counts and also admitted by the demurrer, that the plaintiff could and would have sublet the demised premises for the same rent he was to pay for residue of the term but for the wrongful acts and prevention of it by the defendant in the manner stated in them, likewise import in law an indirect injury to the plaintiff by the defendant for which an action on the case will lie.

Under the proceedings had, as alleged in them, by the defendant against the plaintiff to recover the rent, and by which he recovered the rent for the whole year, there was no way in which the plaintiff could avail himself of

these matters as a defense against it except on the return of the attachment to this court; but the fact that he did not then attempt to avail himself of any of the matters of fact alleged in any of the counts in the narr, and particularly, as alleged in the first count, as a defense against the defendant's demand for rent for the residue of the term after the plaintiff's wrongful eviction by him from the demised premises, will not bar his right to maintain this action.

The ground of action on which the last count is based is an alleged false and malicious proceeding by the defendant without probable cause or good grounds to believe that the plaintiff intended to remove his effects from the county, or otherwise to dispose of the same, and would so remove or dispose of them before the rent would become due, so as to defeat a distress for it under the provisions of the statute for attachment and security of rent in such a case; but notwithstanding the matters of fact alleged in it was a resort to legal process and was *prima facie* for a lawful and proper purpose, yet if the material allegations of the plaintiff in this count be admitted, as they also were by the general demurrer to it as well as to all the other counts, it was upon the principle which lies at the foundation of all actions for malicious suits and prosecutions without probable cause and malicious, viz., a malicious abuse and perversion of the process and proceeding provided for in the statute for which this action will lie.

ACTION on the case. The narr alleged that the defendant, being the owner of a certain messuage with the premises situate in the city of Wilmington, demised the same to the plaintiff for the term of one year from the 25th day of March, 1873, with the exception of three rooms thereof, to wit, the front room or store, the bar-room, and the room back of it in the first story, together with the back cellar and the right to use the water-closet, with ingress and egress to and from it at all times, and also to store barrels in such parts of the front cellar as might not interfere with the plaintiff's requirements, at the rent of three hundred dollars for the year, payable quarterly in equal sums of seventy-five dollars on the 25th days of June, September, December, and March then next ensuing, in pursuance of which the plaintiff with his family entered into possession thereof and continued to occupy the same until the 24th day of June following; but that from the time of his so entering into the possession of them up to the time last mentioned, he and his family and persons visiting them had been so much annoyed and disturbed by gaming, unseemly sports, uncouth noises, profane and obscene expressions in the por-

tion of the house reserved and occupied by the defendant, often continued and kept up until a late hour of the night, that he was constrained and obliged to remove therefrom with his family on the day last mentioned and was thereby subjected to great trouble, inconvenience, and expense in removing his family and furniture therefrom and in procuring and renting another house for them, and also in subjecting his household goods to be taken on an attachment for rent which the defendant without any previous demand therefor, thereupon cause to be issued forthwith against them, and under which they were held and detained until the plaintiff gave security for the payment thereof when it should become due. In another count the plaintiff alleged that on being so obliged to leave the premises he concluded to sublet the same, and for that purpose affixed to the building a written notice advertising his demised portion of it for rent, and that after so doing he had from time to time divers applications from several persons to rent the same who went to inspect the premises with that view but were prevented by the defendant from doing so, who interposed to prohibit it and wrongfully and unjustly posted a placard and notice in writing under the said advertisement of the plaintiff on the said building forewarning all persons against renting the same from the plaintiff and notifying them that no persons renting the same from the plaintiff could have the possession thereof, and that he announced personally to divers persons who had applied to the plaintiff to rent the premises that they could not have them, and that he would throw them out if they entered them, and so prevented the plaintiff from underletting the premises and by reason of which they remained unlet on his hands during the whole residue of the term for which he had rented them. There were several other counts varying substantially from the one last stated only in alleging that the defendant denied in the written notice appended by him to the advertisement posted by the plaintiff on the building that he had any right to rent or sublet the premises, and also in specially alleging in one of them that the plaintiff, having agreed to sublet the same for the residue of the term (nine months) to one H. B. Bullen, at the rent of twenty-five dollars per month, the defendant by false insinua-

tions and intimidations drove him away and prevented the consummation of the bargain to the like injury and detriment of the plaintiff. The fifth and last count alleged that as the plaintiff was about to remove his family and furniture from the premises into another house which he had thereupon rented in the city of Wilmington, and after he had commenced doing so in the presence of the defendant and had informed him of his intention to so remove them and being ready and willing and intending to pay him the rent therefor as it became due, the defendant, continuing and intending maliciously to injure him in his good name, fame, and credit, and to bring him into scandal and discredit and to vex, harass, and injure him, appeared before the prothonotary of this court on the 24th day of March, 1873, and made affidavit of the lease and renting of the premises by him to the plaintiff and of the amount that would be due and payable thereon at the expiration of it on the 25th day of March, 1874, and that he had good grounds to believe that the plaintiff as such tenant intended to remove his effects from the county or otherwise dispose of the same and would so remove or dispose of them before the rent would become due so as to defeat a distress for said rent, and thereupon sued out a writ of attachment returnable at the then next term of this court, directed to the sheriff of this county, against the goods and chattels of the plaintiff and for summoning garnishees, on which the furniture of the plaintiff that he was then having removed from the said premises were on the same day attached and seized by the sheriff and held against the plaintiff to his great mortification, annoyance, inconvenience, and detriment, until he gave under protest to the defendant and under the exaction and approval of the officer serving the writ, a bond, with Henry F. Pickels as surety thereon and a warrant of attorney thereto annexed, to confess judgment thereon, *sine breve*, in the penal sum of six hundred dollars condition for the payment of three hundred dollars, and paid the costs thereon amounting to ten dollars, and that the defendant afterward wrongfully and to annoy, injure, and oppress the plaintiff, caused judgment to be entered upon the said bond by virtue of the warrant of attorney and execution to be issued thereon out of this court to the great cost and

trouble of the plaintiff without any previous demand for the money accruing or accrued thereon or of the said rent. And that the defendant falsely and maliciously and without any reasonable or probable cause and without good grounds for believing that the plaintiff intended to remove his effects from the county or otherwise to dispose of the same and would so remove or dispose of them before the rent would become due, so as to defeat a distress for it, made the said affidavit and complaint and caused the process to be issued thereon as before stated. The count then further alleged that the plaintiff had no intention of so removing or otherwise disposing of his said effects, but his intention only was to remove for the greater comfort of his family to another house in the city of Wilmington, all of which had been announced to and was well known to the defendant and which purpose was fully carried out by the plaintiff, who still owns the goods and chattels so removed from the demised premises and still resides and is engaged in business in said city. And to all of which counts the defendant demurred generally.

The Court: The demurrer, of course, admits all the material facts alleged in the several counts in the declaration. It admits the lease, which was in writing, and that, too, without the defendant alleging or pretending that it contained any terms of restriction as to the subletting of the premises by the plaintiff as the tenant of them. It also admits the facts alleged by the plaintiff that he was obliged by the annoyance and disturbance stated to remove with his family from them and to rent another house in the city at the close of the first quarter of the term; and that the plaintiff thereupon, as he had a legal right to do under such a lease, advertised them for rent, and could and would have sublet them at a rent of twenty-five dollars per month for the residue of the term (the same that he was to pay for them) had not the defendant wrongfully prevented him from doing so in the manner alleged in the first four counts; and in consequence of which, as he alleges and as is also admitted by the demurrer, he lost the benefit of obtaining the same amount of rent from them which he had to pay the defendant for them during the residue of the term. And such being the allegations

and admissions on the face of the pleadings, the case as presented in the first count would import in law a constructive eviction of the plaintiff from the demised premises as the result of the wrongful acts and conduct of the defendant, and, of course, *prima facie* an indirect injury to him for which the action will lie. *Billany v. Smith*, 4 *Houst.* 116, 117. While it is equally clear that the facts alleged in each of the three succeeding counts and admitted by the demurrer that the plaintiff could and would have sublet the demised premises for the residue of the term but for the wrongful acts and the prevention thereof by the defendant in the manner stated, also import an indirect injury to the plaintiff committed without force by the defendant, for which *prima facie* an action on the case will lie. Under the proceedings had for the recovery of the rent, and by which the defendant recovered it for the whole term, the plaintiff had no means of availing himself of any of these matters by way of defense except on the return of the attachment to this court. But the fact that he did not then attempt to avail himself of any of the matters alleged, and particularly as alleged in the first count, by way of defense to the demand for rent for the residue of the term after his eviction from the demised premises does not bar his right to institute and maintain the present action. The ground of action, however, on which the fifth and last count is founded is different, inasmuch as it is for an alleged false and malicious proceeding by the defendant without probable cause or good grounds to believe that the plaintiff intended to remove his effects from the county, or otherwise dispose of the same, and would so remove or dispose of them before the rent would become due so as to defeat a distress for it, under the provisions of the statute for the attachment and security of the rent in such case made and provided. *Rev. Code Amend.*, chap. 120, sec. 52, p. 714. But notwithstanding it was a resort to legal process, and was *prima facie* for a lawful and proper purpose, yet if the allegations of the plaintiff in this case be admitted, as they unquestionably are by the general demurrer to this, as well as the other counts, that it was falsely and maliciously instituted by the defendant without probable cause or good reason to

believe that the plaintiff intended to do so, and that it was not done for the purpose of securing the rent when it should become due, but thereby maliciously to annoy, injure, and oppress the plaintiff, it was on the principle which lies at the foundation of all actions at law for malicious suits and prosecutions without probable cause, an abuse and perversion of the process and proceeding provided for in the statute for which the action in this case will lie.

Judgment must therefore be entered on the demurrer in favor of the plaintiff and against the defendant upon all the counts in the narr.

Patterson, for the plaintiff.

Whitely, for the defendant.

WILLIAM P. SMITH v. HOWARD P. WALTON and BRADLEY JAMES, trading as WALTON & JAMES.

In cases of contracts for the payment of money of the delivery of goods where no place is named in the agreement for the payment or delivery, or no established usage prevails to the contrary, as in cases of promissory notes and bills of exchange, the party has the whole day at any place where he may meet the other party and have the proper means and opportunity so far as they are both concerned of making the tender, in which to make it, and he is bound to find the other party at his peril within the time limited if he is in the State, and he must do all that he can do, without the concurrence of the other party, to make the payment or delivery, and that at a convenient time before midnight, such time varying according to the quantum of the payment to be made or the nature of the goods to be delivered and received.

ACTION of covenant on articles of agreement under seal by which the defendants agreed on the 18th day of April, 1874, to sell and deliver to the plaintiff at his ice-house in the city of Wilmington, between that time and the 1st day of January following, at the price of nine dollars per ton, so much Eastern ice as the plaintiff should require from time to time during that

period, the entire quantity during that period, however, not to exceed one thousand tons, and not be less than two nor more than twenty tons to be delivered in any one week, and no delivery to be of less than one ton. But in case the defendants should not at any time during the period have sufficient Eastern ice to sell and deliver to the plaintiff as aforesaid when required by him, they might deliver Delaware Meadow ice in lieu thereof at the price of six dollars per ton until they should have had reasonable time to replenish their stock of Eastern ice. In consideration whereof the plaintiff covenanted and agreed with the defendants to pay them, on each and every Monday during that period after the first delivery of the ice, the price of nine dollars per ton for so much Eastern ice and six dollars per ton for so much Delaware Meadow ice as should have been so delivered to him during the week next preceding such day of payment. And in case of default in any such weekly payment on the day it should be due, the defendants might refuse to deliver any more, and at their option be excused and released from the further performance of the contract.

The defendants pleaded among other pleas the following which were demurred to generally. That they were dealers in ice in the city of Wilmington, having two well-known places of business there for the purpose, one at the corner of Fifteenth and King Streets and the other at No. 2 West Third Street. That the custom of the trade and their custom and usage was to attend at their respective places of business for the purpose of paying and receiving money arising out of ice transactions till 6 o'clock P. M. daily, and not ordinarily later. That on the said 22d day of June, 1874, they were at their said respective places of business until and after the said hour, ready and willing to receive said money from the plaintiff, but the same was not then or there paid or tendered to them. The next varied from the proceeding only in alleging that their hours for receiving and paying money at their said places of business arising in said business was from 7 o'clock A. M. to 6 o'clock P. M. in summer, and then they were open all day, all of which was known to plaintiff, and that he did not during that time pay or tender the same money to them at either of their said

places of business during the said business hours, although the defendants were then and there ready to receive it. That although the defendants had established places of business in the said city of Wilmington well known to the plaintiff, yet he did not pay or offer to pay them at any of the said places of business on the said 22d day of June, 1874, a sufficient time before sundown to enable them to count and examine the money tendered before the setting of the sun, although they were at their said places of business and ready and willing to receive the same if tendered in time. That although the defendants resided in Wilmington and were after their usual business hours, to wit from 6 o'clock P. M. on the said 22d day of June, 1874, at their respective places of residence and ready till a sufficient time before sundown to receive and count such money as the plaintiff should then and there tender to pay them for ice furnished him during the preceding week under the said contract, yet he did not pay or tender to them the said money on said day at a sufficient time to enable them to count and examine it before sunset. That although they were on said 22d day of June, 1874, at their usual places of business in said city ready and willing to receive said money from the plaintiff during the whole of the business hours of said day, to wit, from 7 o'clock A. M. till 6 o'clock P. M., yet the plaintiff did not within said time pay or tender to them the said money due for said preceding week's ice during the said business hours at their said places of business or either of them, or at any other place a reasonable time before sunset of said day.

Spruance, for the plaintiff: This is not a case of negotiable paper in relation to which the rule of tender is different. Where no place is appointed in the contract for the performance or payment, tender to the party anywhere is sufficient. *Slingerland v. Morse*, 8 *Johns*. 474. In this case the plaintiff had the whole of the day until twelve o'clock at night to make the tender, or at all events until such a period of it as afforded the party sufficient time simply to count the money before that hour. *Add. on Contr.* 235, 1133, 1834; 1 *Pars. on Contr.* 444; *Ch. on Contr.* 388; *Startup v. Macdonald*, 6 *M. & G.* 593 (46 *E. C. L. R.* 623).

Patterson, for the defendants: It is alleged in the pleas demurred to that it was the custom and usage of the defendants to receive and pay money in their business at their places of business between the hours stated, which the demurrers admit, and a general usage of trade is binding in law. 3 *Kent's Com.* 103; *Ch. on Contr.* 21. Where no place of payment is agreed on it must be paid or tendered according to the presumed intention of the parties. 1 *Bouv. Inst.* 319. And a tender of money must be made in the daytime before the light is gone. 6 *Cow.* 728. It must be made before sunset at the usual place of abode of the creditor unless some other place is agreed upon for the payment. 1 *Tyl.* 384; *A. K. Marshall* 321; 1 *Greenl.* 120; 2 *Conn.* 69; 5 *Yerg.* 410; 19 *Ver.* 587; *Add. on Contr.* 1132; 2 *Pars. on Contr.* 161 *n. v.*; 4 *Taunt.* 549; *Ch. on Contr.* 727, note 1; 3 *Wash. C. C. R.* 140; 1 *M. & W.* 347; *Startup v. Macdonald*, 6 *M. & G.* 593 (46 *E. C. L. R.* 623); 25 *Wend.* 405; *Smith v. Smith*, 2 *Hill* 351; 16 *Pick.* 46.

Spruance, in reply: It will be observed that in none of the pleas demurred to have the defendants alleged that the tender was made at an unreasonable time or place or in an unreasonable manner.

The Court: In cases of this kind it is now the practice to plead that the tender, though made on the last day for the payment of the money of the delivery of the goods, was not made within a reasonable and proper time for the receipt of the money or the acceptance of the goods by the defendants before the last hour or midnight of that day, and in the latest case in which the question here presented was most fully argued by counsel and maturely considered by the Court of Exchequer Chamber in England, the general and correct doctrine of the law on the subject is well stated by *Parke, B.*, where no place is named in the agreement for the payment or delivery, or no established usage prevails to the contrary, as in the case of promissory notes and bills of exchange, and that is, that the party has the whole of the day at any place where he may meet the other party, and have the proper means and opportunity so far as they are both

concerned of making the tender, in which to make it, subject to the qualification just stated. In such a case he says the party bound must find the other at his peril and within the time limited if the other be within the four seas, and he must do all that without the concurrence of the other that he can do to make the payment or perform the act, and that at a convenient time before midnight, such time varying according to the quantum of the payment or the nature of the act to be done or the delivery of the goods to be made and received. Therefore, if he is to pay a sum of money he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count it; or, if he is to deliver goods, he must tender them so as to allow a sufficient time for the examination and receipt of them by the other. This done, he has so far as he could paid or delivered within the time; and it is by the fault of the other only that the payment or delivery is not complete. *Startup v. Macdonald*, 46 E. C. L. R. 623.

In this case there was no such established commercial usage in contemplation of law as required that the tender of the payment should have been made to the defendants at either of their places of business, or within the usual business hours on the day in question, or before sunset anywhere on that day in the absence of any stipulation in the contract to that effect.

Judgment is therefore ordered to be entered for the plaintiff on the demurrers.

EDWARD MCINTIRE v. JAMES BARKLEY and SAMUEL BARKLEY, garnishees of HENRY B. MCINTIRE.

Where a landlord buys in the unexpired term of his tenant at sheriff's sale of his goods and chattels taken in execution at the suit of another on the demised premises under a rent of money at the close of the first quarter of the rental year, and receives from the sheriff out of the proceeds of sale the whole amount of the year's rent then growing due, the provision of the statute will apply to the case and he will be entitled to the whole of the rent for the one year so paid, and not merely to the first quarter of it due at the time of the sheriff's sale of the unexpired term of the tenant in them.

The principle ruled in *Ganse v. Richardson*, 4 *Houst.* 222, must be confined to the particular facts of that case.

In such a case if there be two landlords and the sale of the unexpired term of the lease be returned by the sheriff as having been made to one of them, it may be proved that it was in fact made to him for and on account of both of them.

ATTACHMENT *fi fa.* and plea of *nulla bona.* Edward McIntire, the plaintiff, had an execution levied by the sheriff on the goods of Henry B. McIntire, the defendant in it, who was a tenant and lessee of the garnishees named of certain premises for a year at a rent of nine hundred and sixty dollars per annum, payable quarterly in equal sums of two hundred and forty dollars from the 25th of March, 1874, to the 25th of March, 1875. At the sale by the sheriff on the execution James and Samuel Barkley, the lessors of Henry B. McIntire, the defendant in it, and garnishees of the same in this suit, bought the unexpired term of their lease to him of the premises for three hundred and five dollars, and on the return of the execution and sale they received as the landlords of the premises from the sheriff out of the sale their one year's rent of nine hundred and sixty dollars.

The claim of the plaintiff in the attachment *fi. fa.*, Edward McIntire, was for the amount of eight months of the rent of the premises from July 25th, 1874, to March 25th, 1875.

The sheriff's sale on the execution was returned as made to James Barkley, and not to James Barkley & Co., which firm consisted of James and Samuel Barkley, the garnishees in this case.

Whitely, for the plaintiff, called a witness to prove that notwithstanding the sale was so returned by the sheriff, the purchase of the unexpired term of the lease of the premises at the sale was, in fact, made by James Barkley for and on account of the firm, consisting of himself and his brother, Samuel Barkley.

Harrington (*Bird* with him for the defendants), objected to the competency of the proposed testimony, as the return was a matter of record, and therefore could not be contradicted.

By the Court: This is not a suit against the sheriff on the return, when his return is in general conclusive against him, and cannot be varied, contradicted, or qualified by extraneous evidence; but when the suit is between other parties it is always competent to prove such a fact as this if the witness knows it of his own knowledge.

The witness was then sworn and proved the statement of the counsel.

The counsel for the plaintiff claimed, on the authority of the ruling in this court in the case of *W. R. & H. Ganse v. Richardson, Sheriff*, 4 *Houst.* 222, that the defendants were not entitled to a full year's rent under the statute as landlords of the rented premises after they had bought in at the sheriff's sale the unexpired term of the lease, which was then to continue eight months longer, and had thus sunk and merged the leasehold estate in the premises in the fee simple reversion subsisting in them up to that time by their own voluntary act, but that in law and equity the utmost they could claim was the equivalent of the rent for the three preceding months which had accrued up to that time. As, however, they had been paid by the sheriff contrary to the ruling in that case out of the proceeds of the sale on the execution the sum of nine hundred and sixty dollars, the equivalent of the whole rent for that entire year, the plaintiff claimed the two-thirds of that amount as money had and received by them to his use, and which but for that misapplication Henry B. McIntire would have been entitled to, and to which he was now entitled under his attachment against him and the defendants as his garnishees.

The counsel for the defendants admitted that the sale of the unexpired term of the lease took place on the 10th day of July, 1874, and that the lessors, the purchasers of it, went into possession of the premises immediately afterward, but they denied that it thereupon merged in the reversion or so far extinguished the leasehold estate as to deprive the defendants, who were lessors and landlords of the premises up to the time of the sale and had been for nearly three months prior to that time, of their right to one year's rent under the statute, and they also denied that the case referred to in 4 *Houst. Rep.* 222 had ruled the

principle contended for on the other side. They stated, and it was not contradicted, that the three hundred and five dollars bid and paid for by the lessors for the unexpired term of the lease had been paid by the sheriff to Henry B. McIntire, the defendant in the execution or attachment.

The Court, Comegys, C. J., charged the jury: The statute referred to in the case provides that if goods and chattels of a tenant being upon premises held by him by demise under a rent of money be seized by virtue of any process of execution, attachment, or sequestration, they shall be liable for one year's rent of the premises in arrear or growing due at the time of such seizure in preference to such process; accordingly the landlord shall be paid such rent (not exceeding one year's rent) out of the proceeds of the sale of such goods and chattels before anything shall be applicable to such process. We do not consider the case of *Ganse v. Richardson*, 4 *Houst.* 222, sustains the claim of the plaintiff in this case. He then stated that case and what was ruled in it and added, "The words of the statute are general and comprehensive and without any qualification or exception, and we consider the provision of it just read applies to and embraces this case. The case cited and referred to, we think, must be confined to the facts which appear in that case."

The defendants had a verdict.

THE FIDELITY TRUST and SAFE DEPOSIT COMPANY, Administrator of THEOPHILUS T. DERINGER, deceased, v. DAVID G. NEVIN and ESTALINA W. DERINGER, Administrators of BRONOUGH M. DERINGER, deceased.

A party properly notified to produce a paper in his possession on the trial of a case is required to produce it if demanded for the inspection of the counsel of the opposite party before the trial has commenced.

THIS case was on the list and marked for trial, and having been postponed several days to give the counsel for the defend-

ants time to produce a certain paper or account in the possession of one of the defendants who resided out of the State as alleged in the notice which had been served upon him by the counsel on the other side for that purpose, and the case having now been called for trial,

Higgins, for the plaintiff, called for the production of the paper, as he desired and had a right to see and inspect it before the trial had commenced.

G. B. Rodney, for the defendants: The usual practice for a long time in similar cases had been to call for and produce the paper required in the notice given at the proper and appropriate time in the development of the evidence during the progress of the trial, and objected that the plaintiff had no right to demand the production of it before the trial had commenced.

By the Court: This proceeding is of a somewhat novel and peculiar character in this court, and the notice served is by virtue of a special and comparatively recent statute, under which we have had as yet but little practice. We think, however, a fair and reasonable construction of it requires that the paper called for and demanded should not be produced before the trial has been commenced for the inspection of the counsel on the other side who has called for it, if it can now be produced, and if it cannot that such response shall now be made to the order as the counsel for the defendants may have to make to it.

HOWARD P. WALTON and BRADLEY JAMES, trading under the name and firm of WALTON & JAMES, v. JAMES E. BLACK, and JAMES E. BLACK v. THE SAME FIRM.

In a written agreement for the purchase of merchantable ice, to be delivered thereafter, the terms mean such ice as could be sold in the market at the ordinary price prevailing in it when delivered.

Where by the terms of the agreement the vendor was to sell and deliver on shipboard at his place of business ten thousand tons of merchantable ice in

equal parts during the months of May, June, and July, then next ensuing, properly packed for a voyage from the State of Maine to Wilmington, Delaware, where the purchasers resided, at a price per ton stipulated in the contract, the purchaser must first name the ship and give the vendor notice of his readiness to receive it on board of her at the place of shipment.

The purchaser of goods to be delivered in installments and to be paid for as so delivered cannot claim further deliveries without paying for the part which has been delivered, and therefore he cannot require the tender of any more of them by the vendor without doing so.

Where a purchaser of goods shipped to him accepts a draft on him by the vendor for the price of them before the ship's arrival with them, and on her arrival receives and retains them, he is bound to pay it, although they may not be merchantable or in accordance with the stipulation in the contract as to quality if they are of any value whatever.

THESE were cross-actions of *assumpsit* with the usual pleas between the parties named, and by consent of counsel were tried together before the same jury. The action first mentioned was on a written agreement between the parties dated April 21st, 1874, in which the firm of Walton & James agreed to buy and receive from James E. Black ten thousand tons of merchantable ice, properly packed on board, for a voyage to Wilmington, Delaware, from the State of Maine, the same to be shipped in equal parts during the months of May, June, and July, 1874, and to pay for it in accepted drafts due and payable in sixty days from the date of the signing of the bill of lading of each cargo of the above ice, properly drawn through the banks, as customary in such transactions, for which they agreed to pay four dollars and fifty cents per ton on board in the State of Maine.

The first cargo, consisting of three hundred and five tons, was shipped to them in Wilmington, and on the 8th of May, 1874, Black drew a draft on them at sixty days for one thousand three hundred and seventy-two dollars and fifty cents, and forwarded it with a bill of lading of that date attached by mail to them but which they refused to pay at maturity, because, as they alleged, the ice was not merchantable and of such quality as the contract required. As to the quality of the ice, several witnesses were examined on each side, and the testimony was conflicting and contradictory in its character. Both actions were for the alleged breach of the agreement by the respective defendants.

Patterson for Walton & James, and *Spruance* for James E. Black, in each of the cases.

The Court, Comegys, C. J., charged the jury: That it was only necessary to instruct them as to the legal character and the construction of the contract between the parties, which was in writing.

The meaning of the term merchantable ice which occurs in it was such as could be sold in the market at the usual and ordinary price then prevailing in it, and that the meaning of the agreement or contract was that Walton & James should during the months mentioned in it notify Black when vessels to be paid for by them would be at his place of business, Saco, in the State of Maine, there to receive the ice bargained for to be shipped on board of them, by him for them, to the amount of ten thousand tons in all, during those months, and that they would there have it properly packed on board of such vessels sent by them for a voyage to Wilmington in equal parts or quantities during the same months and to pay him four dollars and fifty cents per ton for it on board in the State of Maine, in accepted drafts to be drawn by him on them at sixty days from the date of the signing of the bill of lading of each of the cargoes of it, and the fact proved and not disputed that such was the course pursued by both of the parties with regard to the shipment of the first cargo of it early in the month of May in that year, might be considered by the jury as evidence that such was the understanding as to the meaning of the contract by both of the parties to it.

There were also certain well-settled principles of law which were applicable to the construction of such a contract as this which should guide and govern the jury in the consideration and decision of the questions of fact involved in the cases now before them, and one of which was that where the vendor is to deliver a specified quantity of goods on shipboard at the port of shipment within a certain period, the purchaser must first name the ship and give the vendor notice of his readiness to receive them on board of her; another was that the purchaser of goods to be delivered in installments and to be paid for as deliv-

ered cannot claim further deliveries under the contract without paying for the part which has been delivered, and therefore he cannot require the vendor to tender the balance without paying for the part which he has received. Again, where the purchaser of goods shipped to him accepts a draft for the price of them before the arrival of the ship, and receives and retains them, he is bound to pay the draft, although the goods are found to be unmerchable and not in accordance with the contract, if they are of any value whatever; for while fraud or a total failure of the consideration for the acceptance is a good defense in such a case, a partial failure of it is not.

It would be for the jury, however, to determine from the evidence, which was quite conflicting and contradictory on that point, what was the quality and value per ton of the ice, and what was the quantity of it delivered by Black to Walton & James during the time limited and designated in the contract or during any part of it; and if he was prevented from delivering to them during the three months mentioned merchantable ice to the amount of ten thousand tons by the failure or refusal on their part to receive it as agreed upon in the contract, then how much of the ten thousand tons of such ice he was so prevented by them from delivering to them, and the profit he would have realized upon it at the stipulated price of four dollars and fifty cents per ton, had it been delivered by him to them pursuant to the stipulations of the contract. In the case of *Black v. Walton & James*, provided the jury should be satisfied from the evidence and upon the principles of law which had just been stated to them by the court, that he was entitled to recover in the action, the basis and measure of the damage to be found for him would be the amount of the profits so lost, if any, in consequence of his being prevented by them from delivering to them the whole quantity of ice specified in the contract as before stated, together with the amount of his draft on them of the date of the 8th of May, 1874, for one thousand three hundred and seventy-two dollars and fifty cents at sixty days, with interest thereon from its maturity and the costs of protest, subject, however, to such deductions therefrom as the jury may consider and believe ought to be made in their favor by reason

of any inferiority, if there was any proved to their satisfaction, in the quality of the ice which was delivered to and received by them to that of the ice which was contracted to be delivered to and to be received by them, and all of which by the terms of the contract was to be merchantable ice.

As they were cross-actions being tried together, they could set off the claim in the one case against the claim in the other, and return their verdicts in the two cases accordingly. Black, the defendant, had a verdict in the first case for costs, and the plaintiff, in the second, a verdict for four thousand five hundred and twenty-nine dollars and forty-seven cents.

SUPERIOR COURT.

FALL SESSIONS.

1876.

THORNTON, CONROW & CO. v. WILLIAM H. HERRING.

The words "payable at the Farmers' Bank" in the body of a negotiable promissory note is a material part of it, and if omitted in the declaration upon it it will constitute a fatal variance.

In such a case where the bar of the statute of limitations would defeat another action upon the note, after the jury had been sworn and it had been offered in evidence and ruled out, the court granted leave to amend the narr, directed a juror to be withdrawn and the case to be continued.

ASSUMPSIT on a promissory note for one hundred and eighty-six dollars and four cents at sixty days, dated June 17th, 1870, and payable to the order of the plaintiffs at the Farmers' Bank at Dover, Delaware, which was offered in evidence.

Ridgely (*Smithers* with him), for the defendant, objected to its admissibility in evidence because the note declared on and described in the declaration was alleged in it to be payable generally and not at the Farmers' Bank, as the note now offered in evidence appeared on its face to be. There was therefore a misdescription of it in the narr, and it constituted a material and fatal variance between them. 2 *Ch. on Pl.* 118.

Fulton, for the plaintiffs: The variance was not material, for the defendant had notice that the note now offered in evidence was the identical note sued and declared on in this action,

because a complete and correct copy of it was filed with the declarations on it in the office of the prothonotary pursuant to the provision of the statute. It was not necessary either to allege or prove that it had been presented at the Farmers' Bank for payment at maturity, and it has been so held in this court.

The Court held the variance to be material and ruled out the evidence offered.

Fulton then asked leave of the court to amend the declaration with a proper description of the note in that particular, and urged the application with much earnestness, as the statute of limitations would bar another action upon it, which, after argument and a suggestion from the counsel on the other side to that effect, the court granted leave to amend on condition that a juror should be withdrawn and the case continued, the costs of this term to abide the ultimate determination of the case.

EDWIN C. SHAW v. BENJAMIN T. FLEMING.

The object of a writ of restitution under the provision of the statute in relation to the jurisdiction of justices of the peace in cases of forcible entry and detainer, and of holding over lands and tenements, *Revised Code, chap. 101, p. 626*, where a judgment has been recovered under it against the party committing the forcible entry and detainer, or against a tenant holding over after notice to quit, and the same has been executed and has afterward been reversed on *certiorari* in the Superior Court, is to order the proceeds of the sale on the execution to be paid to the defendant in it in the first case and to restore the removed tenant and defendant in it to the possession of his term in the second case.

The Superior Court has special authority under the statute upon a writ of *certiorari* in cases of tenants holding over after notice to quit, to amend the record of the justice of the peace where the defects are purely formal and apparent on the face of the proceedings before him.

RULE to show cause why a writ of restitution should not be awarded to restore the plaintiff, Edwin C. Shaw, to the possession of his term in a hotel and premises in the town of Har-

rington which he had rented of the defendant, Benjamin T. Fleming, who had three months before the expiration of the preceding rental year of the premises duly notified him to leave them at the end of it, which he refused to do, whereupon he instituted a proceeding under the statute, *Revised Code, chap. 101, p. 626*, before a justice of the peace of the county to remove him from the premises and to recover the possession of them in which he obtained judgment against him, and by virtue of an execution and a warrant of possession thereon Shaw was ousted from the premises and the possession of them was delivered to Fleming; but at this term of the court the judgment recovered before the justice of the peace had been reversed on a writ of *certiorari* in this court and thereupon on the petition and affidavit of Shaw this rule was laid to show cause why a writ of restitution should not be awarded in the case to restore the possession of his term to him. The allegations on which it was founded and the testimony in support of them will sufficiently appear in the opinion of the court.

Wales, J., delivered the opinion of the court: This is a rule to show cause why a writ of restitution should not be awarded. The plaintiff's affidavit on which the rule was granted states that he became the tenant of a tavern house in Harrington under a lease executed by the defendant for the term of three years from the 12th day of November, 1870, and that after the expiration of the lease he continued to be tenant and occupant of the property under a parol letting from year to year, until the 10th day of January, 1876, when he was dispossessed by a warrant issued on a judgment which had been obtained against him for holding over after notice to quit; that this judgment has since been reversed on a writ of *certiorari* to the justice by whom it was rendered, and he now asks to be restored to the possession of the said tavern house as tenant on two grounds: First, that his tenancy would have regularly ended on the 12th of November, 1875, and no notice to quit on that day was ever served on him; secondly, that the notice served on him in the month of September, 1875, to give up possession on the 1st of January following, was revoked by the subsequent agreement of

the landlord to extend the term for another year. This application is founded on *sec. 18, chap. 101, Rev. Code 632*, which is as follows: "Such judgment shall not be reversed for any formal defect, not for any error which the court, upon the face of the proceedings, can amend. A *certiorari* shall not be a supersedeas to the issuing or executing a warrant for delivering possession; and upon the reversal of a judgment the court shall not award a writ of restitution unless they shall consider that, according to the merits of the case, such writ ought to be awarded."

The judgment below was reversed on account of a defect in the record which did not concern the merits of the case, but which this court did not, at the time it was brought up, consider to be amendable. The error was in the form of the verdict on which the judgment was entered by the justice. The statute requires that in the trial of cases for forcible entry and detainer, and of a tenant holding over, the jury "shall return a verdict in writing under their hands," and prescribes the form of the verdict in each case. In the present case the jury adopted the wrong form in returning their verdict, using the one designed for a case of forcible entry and detainer, and we did not think that we had the power to alter the phraseology so as to make the verdict correspond with the true nature of the proceedings and with the correct form. But on further reflection it does not seem clear that it was not in the power of the court as conferred upon them by section 18, to have made the necessary correction by directing the justice to amend the record so that the verdict, *mutatis mutandis*, would be in the proper form, as it was undoubtedly intended to be in substance. The error was only a formal one and more in the nature of a clerical blunder than a legal defect. This rule was issued at the last term and for want of time to hear it was continued to the present term, when it was, perhaps, too late to reconsider the judgment of reversal, and the plaintiff has thus had his case heard *de novo*.

Two facts have been established by the testimony, or admitted, namely, first, that by general custom in that part of Kent County where this tavern is situated the annual renting of property begins and tenants take possession on the 1st day of January, from which date the payment of rent and the length of the

term are reckoned, and, second, that the notice to quit was in due form and was duly served on the plaintiff. It is claimed on the part of the latter that his tenancy commenced by special agreement on the 12th of November, 1870, and would legally expire on that day and month in any subsequent year, on three months' previous notice given by either the landlord or the tenant. There is no proof that the written lease, which has not been produced, was under seal, and in the absence of proof the plaintiff can be considered as having been only a yearly tenant. *Code, chap. 120, sec. 3.* Nor does the testimony clearly show precisely when the tenancy commenced or what was the understanding between the parties in that respect.

In practice we know that tenants are sometimes let into possession in the middle of a quarter and that the rent and term are to be computed from the beginning of the current or proximate year. The evidence of any agreement, express or implied, on the part of the defendant, made after the service of the notice, is not satisfactory, and the fact that the landlord recommended the granting of a tavern license to the plaintiff for one year from October, 1875, proves nothing more than his willingness that the plaintiff should have such a license up to the 1st of January, which the landlord claimed to be the end of the term. It was not proved that the recommendation was given after the service of the notice to quit. But it was proved that the plaintiff was insolvent and in arrears for rent, that the prospect of his doing better than he had done was not encouraging, and no plausible reason has been assigned why the landlord wanted him to remain another year. An attempt was made to show that the landlord declined to lease the tavern to other parties, but there was no proof that any responsible person who made direct application for the property was put off. The landlord could not give possession to another tenant until the plaintiff had been removed, and when that had been done the present occupant, Macklin, was immediately put into possession. On the whole, the evidence is not conclusive enough to justify us in awarding the writ.

A suggestion was made by the defendant's counsel that to award the writ now would have the effect of extending the term

of the plaintiff beyond another year, and thus put him into a better position than the one he was in before these proceedings were commenced. We are not called on to consider that point. The object of this writ, where there has been a removal from or a sale of the term and a reversal of the judgment on which execution had been taken, is either to restore a party to the possession of his term in the one case, or to order the payment of the proceeds of the sale to him, in the other. *Doe v. Thorn*, 1 *Maule & S.* 425; *Bac. Abr. Execution*, (Q); *Baude's Case*, *Croke James* 41; *Goodyere v. Ince*, *Ib.* 246; *Croke Eliz.* 278, 504, 597.

Rule discharged.

Massey, for plaintiff.

Ridgely & Fulton, for defendant.

THOMAS R. GREEN v. JAMES E. CLAWSON.

A judgment rendered by a justice of the peace on a cause of action of which he has no jurisdiction cannot be pleaded in bar to a suit on the same cause of action between the same parties afterward brought in the Superior Court. Nor is it necessary that it should be reversed before the suit is commenced in this court.

Such a judgment is a nullity and the maxim *nemo debet bis vexari pro eadem causa* does not apply to another suit on the same cause of action in a court having competent jurisdiction of it.

No action will lie on a guardian bond before a justice of the peace.

THIS was an action of debt on a guardian bond in this court against the surety, and a case stated in which it was admitted that the bond was duly executed by the guardian and surety on the 27th day of September, 1870, in the penal sum of one thousand five hundred dollars, with condition for the faithful performance of his duties as such by the guardian pursuant to the statute in such case made and provided. On the 4th day of April, 1873, the guardian passed his final account showing a

balance due the plaintiff, his ward, of seventy-four dollars and twenty-two cents, with interest thereon from the 27th day of September, 1871. On the 10th day of March, 1875, the plaintiff sued the defendant, as surety, on the same guardian bond, before a justice of the peace of the county for the said balance with interest, and on the 27th day of that month recovered judgment therefor amounting to eighty-two dollars and seventy-two cents, and costs of the suit. On the 13th day of October, 1875, this suit was instituted in this court, and on the 2d day of November in the same year the judgment recovered in the suit before the justice of the peace was reversed on a writ of *certiorari* in this court on the ground that he had not jurisdiction of the case. And therefore the only question reserved was whether the judgment recovered before the justice of the peace for the same cause of action was or was not a bar to the action thereon in this court at the time when it was commenced and until it was afterward reversed in this court?

Wales, J., delivered the opinion of the court: This is an action of debt brought against the defendant as the surety of the guardian of the plaintiff, upon a bond executed by the said guardian and the defendant in the penal sum of one thousand five hundred dollars with a collateral condition for the faithful performance of his duties by the guardian as prescribed by the statute. *Revised Code, chap. 96, sec. 9.* The plaintiff was the ward to whom the bond was given, the obligation bearing date the 27th day of September, 1870. On the 4th day of April, 1873, the guardian passed his final account, showing a balance due to his ward of seventy-four dollars and twenty-two cents, with interest from the 27th day of September, 1871. The present action was docketed on the 13th day of October, 1875. Prior to this last mentioned date, to wit, on the 10th day of March, 1875, the plaintiff sued the defendant, as surety on this same bond, before a justice of the peace for the said balance with interest, and on the 27th day of the same month recovered a judgment for eighty-nine dollars and seventy-two cents, that being the amount of the said balance and interest. On the 2d day of November, 1875, the judgment rendered by the justice, having been removed here

by a writ of *certiorari*, was reversed for want of jurisdiction in the magistrate. The only question now to be decided is could the plaintiff legally commence his action of debt in the Superior Court *before* the reversal of the judgment below, the parties, the cause of action, and the sum demanded being identical in each case?

For the defendant it was contended that no one should be twice harassed for the same cause, and that a judgment having been once rendered against him it was conclusive of the matter in dispute between him and the plaintiff so long as it remained on record undisturbed by the decree of a superior tribunal. The statutory provision giving jurisdiction to justices of the peace is in these words: "The justices of the peace shall severally have jurisdiction within their respective counties of all causes of action arising from obligation, or express or implied promise, or contract, for the payment of money, render of rent, or delivery of produce, chattels, goods, wares, or merchandise, or contract or agreement for personal labor, hire, or service, or for any penalty or forfeiture incurred under the provisions of any statute, or of any by-law or ordinance authorized by statute, where the matter in demand shall not exceed one hundred dollars, and a penalty in any obligation or contract exceeding that sum shall not exclude it from this jurisdiction if the sum actually due thereon be within it." (*Rev. Code, chap. 99, sec. 1*). The judgment below was reversed because the cause of action was entirely outside of the power of the justice to determine. His jurisdiction is limited and cannot be enlarged by the consent of one or of all the parties to a suit, and the plaintiff cannot be estopped to deny his jurisdiction by the fact that under a mistake he first brought suit before him. The bond is not an obligation for the direct payment of money or for any of the objects or purposes which are specified in the statute, but is conditioned for the faithful performance by the guardian of the duties of his office, such as the making of true and just accounts of his guardianship and the delivery and payment to his ward on his coming of age all that should then belong and be due to him, etc. The only cause of action on this bond was a breach of the condition, which was clearly not cognizable by the justice and he had

no more right to hear and determine the matter in dispute between the plaintiff and defendant than any other unauthorized official, the sheriff, for instance, or the coroner of the county. The question was not simply whether the guardian was indebted to his former ward, but whether there had been such an infraction of the bond as made the defendant liable for and bound to make good the default of his principal? Matters as far removed from the jurisdiction of the justice as an action of ejectment or an issue of *devisavit vel non* and any judgment he might give in either case would amount to nothing.

But it was claimed for the defendant that, admitting the want of jurisdiction in the justice, the plaintiff could not bring his suit in this court until the judgment below had been reversed. This position is not sustained by any reason or authority which has been brought to our notice. The plea of a prior suit pending in another court for the same cause must set forth that the court has jurisdiction, otherwise the plea will be held to be insufficient. The jurisdiction will not be taken for granted. *Smith v. The Atlantic Ins. Co.*, 2 Foster N. H. 21. It follows, therefore, that where the want of jurisdiction over the subject-matter of the suit or of the parties to it is admitted the whole proceedings must be considered *coram non jure*, and that any judgment obtained thereon will be of no effect—a mere nullity. *Prichett v. Clark*, 4 Harr. 280; *Grimmon v. Raymond*, 1 Conn. 40; *Briscoe v. Stephens*, 9 Eng. C. L. R. 387. In the case of *Frumpton v. Pates*, 3 Levin 23, cited by C. J. Best in *Briscoe v. Stephens*, the court says: "Judgment there given of a thing out of that jurisdiction is absolutely void, and advantage may be taken thereof in pleading without reversal by writ of error." And so well settled is it that a judgment rendered by an inferior court upon a case not arising within its jurisdiction is a nullity, it has been held that if the plaintiff should cause the defendant's goods to be taken in execution on such judgment he would be a trespasser. *The King v. Danser*, 6 T. R. 245.

Judgment for plaintiff.

Massey, for plaintiff.

Fulton, for defendant.

CHARITY CLOUD v. WILLIAM LORE.

The lands of a defendant in a judgment cannot be seized and sold by the sheriff on a *fi. fa.*, even under a waiver by the defendant of the seizure and sale of his personal property and inquisition, without a writ of *venditioni exponas*, at least, for that purpose.

RULE to show cause why the sale of the lands of William Lore, the defendant, which had been sold by the sheriff on a writ of *fi. fa.* without an inquisition or a writ of *ventitioni exponas*, should not be set aside. The rule was granted on the application of William C. Eliason, a judgment creditor of the defendant. The following waiver signed and sealed by the defendant in the *fi. fa.* was indorsed upon the back of it: "I, William Lore, the defendant named in the within writ of *feri facias*, hereby waive the seizure and sale of my personal property under this writ, and do expressly consent that the sheriff of New Castle County shall levy upon my real estate and proceed without inquisition to sell the same in satisfaction of the within writ." Dated October 26th, 1876.

G. B. Rodney, for the plaintiff in the rule.

Lore, for the defendant in the rule, cited *Springer's Admx. v. Johnson et al.*, 3 Harr. 515.

The Court made the rule absolute, and set aside the sale because the land could not be sold on the *fi. ja.* under the waiver even without a writ of *venditioni exponas*, at least, for that purpose.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, a corporation of the State of Pennsylvania, administrator of THEOPHILUS T. DERINGER, deceased, v. DAVID G. NIVEN, administrator of BRONOUGH M. DERINGER, deceased, who was sued with ESTALINA W. DERINGER, administrator of the said BRONOUGH M. Denger, deceased.

By the laws of this State no corporation aggregate, whether incorporated by the legislature of this State or of any other State, can be appoined an administrator in this State, or can sue as an administrator in the courts of this State.

THIS case came up on demurrer and was heard before Comegys, C. J., and Houston, J., Wooten, J., absent. The action and declaration were in *assumpsit* on a number of due bills and promissory notes, the fourth plea to which was that the plaintiff being a foreign corporation existing under the law of another State with power to administer the estates of deceased persons, such power is repugnant to the policy and prejudicial to the interests of this State and of its citizens, and the suit against this defendant, being in that character, cannot be maintained, and this the defendant is ready to verify, etc. The replication to this was that the plaintiff is a corporation duly incorporated and organized under the acts and laws of the General Assembly of the State of Pennsylvania, and by said acts and laws is authorized to accept and execute the office or appointment of executor or administrator or trustee, and to accept and execute all such trusts of every description not inconsistent with the laws of the State of Pennsylvania as may be committed to it by any person or persons whatsoever, or by any corporation or register of wills or by any court of record, whether of the State of Pennsylvania or any other State or of the United States, and that the plaintiff hath been duly appointed and qualified as administrator as aforesaid of the said Theophilus T. Deringer, deceased, by the register of wills of the city and county of Philadelphia in the State of Pennsylvania, and by virtue of said power, office, and appointment is entitled to maintain this action against the said defendant, etc. To this replication the defendant demurs and saith that the said replication and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law for the said plaintiff to have and maintain its aforesaid action thereof against him, the said defendant, and that the said defendant is not by the law of the land bound to answer the same, and this, etc., wherefore for want of a sufficient replication in this behalf he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc. And the defendant, according to the form of statute, etc., shows, etc., the following causes of demurrer in law to the said replication, for that it attempts to put in issue

to be tried by the country mere inference and matter of law, viz.: whether the plaintiff is entitled to maintain the action in the courts of this State by virtue of his official character and under the power derived from the same and the appointment of administrator as alleged and set forth therein as aforesaid, etc.

G. B. Rodney, for the defendant: The party plaintiff in the action is an artificial being and a foreign corporation, and although invested with power by the laws of the State which created it to sue in the extraordinary character and capacity of an administrator in that State, it had no power under those laws to sue in such a capacity in the courts of this State, for they can have no force, operation, or effect as laws beyond the limits of the State which enacted them except such as may be practically accorded them by the courtesy or comity of other States; and there is no practice or custom in this State to sanction or tolerate it, for this is the first time a suit has ever been brought in the courts of this State by a corporation as an administrator either foreign or domestic, and under the laws of this State as they now exist no corporation can be made or appointed an administrator. We have no statute to authorize it, and in the absence of any statute the common law alike of this State and of England will not tolerate it. A corporation aggregate by the common law cannot be an administrator. 1 *Black. Com.* 476; 1 *Wms. on Exrs.* 199; *Toller on Exrs.* 30. An administrator is a trustee and a corporation cannot execute a trust in which it has no interest, or which is repugnant to or inconsistent with the powers conferred upon it or the purposes for which it was created. *Ang. & Ames on Corp.*, sec. 168; *Perry on Trusts*, secs. 42, 43; 1 *Paige* 213. A corporation has no existence or power beyond the limits of the State which creates it except such as the comity of other States may accord to it. *Story on Confl. of Law*, secs. 23, 28, 29, 38; 13 *Pet.* 519; 25 *Wend.* 648. And no State can by comity merely accord to any corporation created by another State a power which cannot be exercised by one of its own creation within its own limits.

Higgins (*Spruance* with him) admitted the general doctrine on the subject as stated by the counsel on the other side, that a cor-

poration aggregate cannot be an administrator at common law. But the question is whether, as in this case, where administration is committed to an artificial or corporate body expressly created for the purpose, among other things, of administering on the estates of deceased persons in due form under the laws of the State where the decedent had his domicile at the time of his death, will be admitted to sue as such here under the usual comity which has been uniformly extended to other foreign administrators and corporations by the courts of this State? There can certainly be no good reason to the contrary.

In granting ancillary letters of administration the practice in the court of probate in England is when the deceased is domiciled in a foreign country to grant administration to the same person to whom it has been granted by the proper court in the foreign country, even if he should not be the party entitled to the administration by the law of England, and in a recent case which had its origin in this State and county, that of Eleanora Sarah Hill, late of Walnut Cottage, New Castle County, State of Delaware, America, spinster, who died in the year 1864, leaving a will dated the 24th of October, 1857, in which she nominated her father, Thomas Fennimore Hill, her sole residuary legatee and executor. He proved the will in America on the 28th of September, 1864, and died there on the 8th of December, 1869. By his will, dated the 31st of July, 1865, he appointed his daughter, Maria Frances Anderson, William McCouch, and Horatio Gates, all domiciled in America, executors, who have proved the testator's will there. Since his death letters of administration with the will annexed on the unadministered estate of Eleanora Sarah Hill have been granted at the request of the executors of Thomas Fenimore Hill to the Reverend George W. Anderson, the husband of Maria Frances Anderson. Some property in England being now divisible by reason of the death of Thomas Fennimore Hill among his daughters, a representation to the estate of Miss Hill in this country is required. The executors have sent over to England a document signed by them in the presence of a British consul, stating that the grant has been made in America to the Reverend George W. Anderson at their special instance and

request, and expressing a desire that the grant in England should be made to him also.

And in that court there LORD PENZANCE said: "In this case I took time to consider the effect of certain documents which had been sent over from America. A grant of administration of the unadministered estate of the deceased had been made in that country, and the party who obtained it applies to this court for a grant to enable him to get possession of the assets of the deceased in England. I have before acted on the general principle that where the court of the country of the domicile of the deceased makes a grant to a party who then comes to this court and satisfies it that by the proper authority of his own country he has been authorized to administer the estate of the deceased, I ought without further consideration to grant power to that person to administer the English assets, In this case the property to be administered forms part of the estate of the deceased father, and according to the practice of this court a representation should first be taken to his estate. And it so happens that in this respect the law of America coincides with that of England. The question then arises whether it is necessary that I should order such a representation to be constituted. I think not. I think I ought to carry out the principle in its integrity; and where I find the proper court in America has given to an individual authority to administer the estate of a person who has died domiciled in America, I should acknowledge that fact as the basis of my proceeding and decree administration to the same person in this country." *In the Goods of E. S. Hill, 2 Law Reports, Courts of Probate, etc.*, 88.

With such an example before us and such a precedent in England, should even this Pennsylvania administrator, duly appointed according to law in the State in which the deceased had his domicile when he died, apply for ancillary letters of administration in this State and county on his estate could they be refused? And if not, why refuse to permit them to sue without doing that?

Rodney replied.

The Court was not satisfied that such a novel grant of administration wholly by virtue of recent statutes enacted in another State, was in accordance with all the requirements essential to constitute a legal and valid administration in this State under the laws of it, and gave judgment for the defendant on the demurrer.

N. L. TOMLINSON & Co. v. JOHN T. QUIGLEY.

As well in actions for the non-payment of the price of goods sold and delivered under a contract as in actions for goods sold and delivered with warranty or in actions for work and labor done under a contract, the defendant may at his election either avail himself of any breach of the contract by the plaintiff causing damage to him in reduction of the damage claimed and sustained by the plaintiff from any breach of it by him, or he may sue the plaintiff for the same independently, and the former suit and recovery against him will be no bar to the latter unless in the former suit he had availed himself of his right and privilege to prove and claim such damage in reduction of the damage demanded in it by the plaintiff from him.

ASSUMPSIT on a written agreement dated April 6th, 1864, in which the defendant agreed to furnish the plaintiffs the flitch timber, plank, keel, bedlogs, etc., etc., that they may require to build a schooner, all first-class Delaware white oak, delivered on the railroad at Twelfth Street as ordered—plank forty dollars per thousand, keel fifty dollars per thousand, bedlogs sixty dollars per thousand, flitch timber thirty-three dollars per thousand; cash along as the timber comes in, part pay, all payments to be made before the schooner leaves Wilmington. The materials were furnished, accepted, and paid for, and they were used in the building of the schooner, but the plaintiffs alleged that they afterward discovered, and only a short time before she was finished, that the materials were not of the best quality of Delaware white oak, but were of a very inferior quality, worth at least one-fourth less in value, on which they then refused for that reason to pay him the balance of his account for it, amounting to about three hundred dollars, for which he had, however, afterward sued them and recovered judgment in this court, and

that the same had since been collected by execution on the judgment and paid to him by the sheriff; and this action was now brought by them against him to recover damages for the breach of the agreement by him and the loss and injury which they had sustained by his failure to furnish materials of the quality stipulated by him in the contract. The pleadings in the case were special and numerous, and had ended in a demurrer by the defendant to a replication of the plaintiffs to one of the pleas entered by him; but as there was no dispute about the facts of the case and they all appeared in the pleadings and on the record, the counsel consented that it might be considered and treated substantially as a case stated. The case was heard before Comegys, C. J., and Houston, J. Absent, Wootten, J.

Higgins, for the plaintiffs: The declaration alleges the breach of a written contract by the defendant to furnish first-class Delaware white oak to the plaintiffs at certain stipulated prices, for building a schooner, in that the lumber furnished by him was not first-class Delaware white oak, but was of a very inferior quality and of much less value than the contract price agreed to be paid for it and which was paid for it. To this the special plea of the defendant is that he furnished the lumber according to the contract, that the plaintiffs accepted it without objection, paid for it in part, and that the defendant for the balance brought a suit under the mechanics' lien law against the plaintiffs in this court and obtained judgment in it for three hundred and six dollars and thirteen cents, and that the plaintiffs afterward paid the same to the sheriff on a *fi. fa.* issued upon it. In their replication to this plea the plaintiffs allege that they did object to the inferiority of the lumber and complained to the defendant of it, but that they did not plead that matter as a defense in the suit against them under the mechanics' lien law in this court or offer any evidence in it to show the damage caused them by the bad and inferior quality of the lumber. And to this replication the defendant has demurred generally and specially.

Where the goods delivered to the buyer are inferior in quality to the warranty, or the vendor's agreement as to quality, the buyer has the choice of three remedies. First, he may refuse to

accept them and return them; secondly, he may accept them and bring an action against the vendor for the breach of the warranty; thirdly, if he has accepted them but not paid for them, he may prove the breach of warranty in reduction of the damages in an action brought against him by the vendor for the price of them. *Benj. on Sales*, sec. 894; 2 *Smith's Ld. Ca.* 35; *Poulton v. Lattimore*, 9 *B. & C.* 259. But notwithstanding the plaintiffs might have availed themselves in the defendant's suit against them in this court for the balance of the contract price of the lumber, of the breach of the contract by him by reason of the inferior quality of it, in reduction of his demand for damages or for the contract price of the balance of the lumber then unpaid for, they were not bound to do so but can now maintain this action against him for that breach of the contract on his part. This was distinctly ruled in the late cases of *Davis v. Hedges*, *Law Rep.* 6 *Q. B.* 687; *Bascom v. Manning*, 52 *N. H.* 132; *Nenj. on Sales*, sec. 899; 2 *Smith's Ld. Ca.* 35. And in such a case the buyer can maintain the action against the vendor without returning or offering to return the goods and without notice to the vendor. *Benj. on Sales*, sec. 889; *Poulton v. Lattimore*, 9 *B. & C.* 259. But the loss and damage sustained by the plaintiffs by reason of the breach of the contract by the defendant must not exceed the amount demanded by him in his action against them in this court and therefore they can only recover the full amount of the damages to which they are justly entitled in a separate action against him. *Mundel v. Steel*, 8 *M. & W.* 858; *Rigge v. Burbidge*, 15 *M. & W.* 598.

Hoffecker (*Harrington* with him), for the defendant: Where an action is brought for goods, furnished at a stipulated price and the purchaser does not, either in bar of the action or in reduction of the damages demanded, object to the quality of them but allows the vendor to recover in it a verdict for the full price agreed on, he cannot afterward maintain an action against the vendor to recover damages upon the ground that the goods were of an inferior quality and unfit for the purpose for which they were ordered. *Fisher v. Samuda et al.*, 1 *Camp.* 194. That case establishes the principle that such a purchaser by suffering

judgment to go against him for the whole price has neglected his opportunity of obtaining a decision on the inferiority of them if there was any, and is estopped from afterward bringing an action on that score. 2 *Smith's Ld. Ca.* 39. Where judgment is suffered for the entire contract price it seems to be an exception to the ruling in the cases of *Sheet v. Blay* and *Poulson v. Lattimore*, in which it is said that the purchaser has and option to give the breach of the vendor in evidence in reduction of the damages in his action for the price of the goods or to sue him on the warranty. 2 *Smith's Ld. Ca.* 39. Supposing there was a partial failure in the quality and value of the lumber delivered and accepted, was not the vendor entitled to recover the price of it in the action brought by him, subject to a fair and proper deduction for the damage which the purchaser had sustained by the non-performance of the contract strictly and completely by the vendor by way of recouping damage, as it is termed, on the authority of the case of *Draper v. Randolph & Co.*, 4 *Harr.* 456, in this court?

In this case the timber was accepted and used by the purchasers, the plaintiffs, and the right of the vendor, the defendant, to recover the stipulated price for it depended upon a condition precedent, viz.: that the timber should be of first-class quality; and in an action by the vendor against them for the stipulated contract price of it, the purchasers, the plaintiffs in the present action and the defendants in the previous suit in this court on the contract, by suffering judgment to go against them for that price confessed that the condition of the contract had been complied with, and were therefore now estopped in this court from pretending or alleging that the lumber was not of the required quality. This is what constitutes an actual acquiescence in the performance of the contract referred to by Mr. Starkie in treating on this subject. 2 *Stark. Ev.* 879. Besides, the plaintiffs might have easily ascertained if there was any defect in the quality of the lumber or any part of it before using it, and could have refused to accept it without any serious inconvenience or prejudice to themselves. The neglect to do so or return the goods or even to make any objection to the quality of them until after the suit was brought to recover the small

balance of some three hundred dollars due for the stipulated price of them, affords a strong presumption that the quality of the lumber corresponded with the quality specified in the contract. This case is precisely that of *Fisher v. Samula*, several times before cited. The American cases are numerous in which it has been held by the courts that a defendant against whom a judgment has been rendered on an express or implied contract cannot sue for the breach or omission of any duty or obligation imposed by it which constituted a condition precedent to the plaintiff's right of action upon it.

Comegys, C. J., delivered the opinion of the court: In this case we are called upon to decide a question presented for the first time for adjudication in this State. It is whether an action will lie for an alleged breach of a contract by the defendant respecting the quality of goods furnished by him after their acceptance by the plaintiffs and his payment for them of the price fixed by the contract. Or, in other words, can the action brought in this case by the plaintiffs against the defendant be maintained in this court under all the facts and circumstances alleged and admitted in the pleadings?

It is an action of *assumpsit* upon a written promise and agreement between the parties that the defendant would furnish the plaintiffs the flitch timber, plank, keel, bedlogs, etc., etc., that they might require to build a schooner, all first-class Delaware white oak, delivered on the railroad at Twelfth Street as ordered, plank forty dollars per thousand, keel fifty dollars per thousand, bedlogs sixty dollars per thousand, flitch timber thirty-three dollars per thousand, cash along as timber comes in, part pay, all payments to be made before the schooner leaves Wilmington, signed John T. Quigley. It is admitted that the same was furnished to them by him in the required quantity but not in the stipulated and required quality of first-class Delaware white oak, and a large part of the contract price was voluntarily paid by them to him for it, and the residue of it was also afterward paid by them to the sheriff on execution process issued upon a judgment obtained in this court by him against them for the balance of it under the mechanics' lien law. No

objection to the timber on the ground of quality or otherwise was made on the delivery of it from time to time, nor was any defense offered by the plaintiffs to this suit in the action against them by the defendant in this court for the balance of the contract price under the mechanics' lien law on the ground of such defect by way of reducing the damages demanded by him in that action; and it is upon these facts and circumstances the question above stated is submitted for our decision.

It is undoubtedly true that down to the time of the decision in the case of *Basten v. Butter*, 7 East. 479, the law was that in an action to recover the contract price of an article sold with a warranty or made by the plaintiff for the defendant, and which was not wholly unfit for the purpose for which it was wanted, or for the performance of services rendered by the plaintiff to the defendant, the defendant could make no defense, in the first case that the article purchased did not correspond to the terms of the warranty, nor in the second case that the article made was unfit for the purpose for which it was designed, nor in the last case that the services were not such as were stipulated for, but he was driven to his cross-action in all such cases to recover in his turn damages for the non-fulfillment of the contract by the adverse party. But that case introduced a different ruling, that the defendant might in such cases show in defense that the work done or articles delivered were not in accordance with the contract and obtain a deduction from the price on that account, or even a verdict against the plaintiff if they were of no value. This was taking a long stride at that time in advance of former judicial decisions in such cases, but there has been no recession from that advance since. The wisdom and policy of it have been uniformly recognized by the English courts in all their decisions in subsequent cases falling within the principle and precedent established by it. The reason for it was that under the former rules in such cases cross-actions were necessary between the parties on the same contract and growing out of the same business transaction between them, and the object of it was to prevent circuity of action and to avoid the waste of time and expense in unnecessary litigation. In practice it was adopted and molded somewhat in analogy to the plea of

set-off established by statute in an action for a money demand, but which can never apply where the mutual demand on either side is for unliquidated damages, for while in the classes of cases mentioned the defendant is now allowed to show a breach of the same contract by the plaintiff to his detriment and injury in reduction of the damage demanded by the plaintiff for his breach of it, in analogy to the statute and plea of set-off, the defendant is not bound in such a case to avail himself of this right and privilege, but as in a case of a plea of set-off under the statute he still has his election to waive it and to sue the plaintiff in a separate action on the contract for the damages he has sustained by his breach of it. And as in case of mutual debts or money demands between the parties to a suit, the defendant may or may not at his option avail himself of his as a defense *pro tanto* against that of the plaintiff by pleading it as a set-off under the statute, and is in no wise prejudiced or concluded or estopped if he omits to do so from afterward suing the plaintiff upon it and recovering the amount of it from him, so in actions to recover the contract price of goods sold with warranty or of services rendered, it was decided that a defendant who had sustained damage by a breach of the same contract on the part of the plaintiff had a similar option and might or might not avail himself of it as a defense in the action of the plaintiff against him and in reduction of the damages claimed by him for the breach of the contract by the defendant, but if he omitted to avail himself of it in that manner he was not to be precluded afterward from bringing his action upon it against the plaintiff. Such is unquestionably the settled law now in England on this point, and also in this country, we believe, so far as we have been able to ascertain it. *Street & Blay*, 2 *Barn. & Adol.* 456; *Poulton v. Lattimore*, 9 *Barn. & Cres.* 259; *Moundel & Steel*, 8 *M. & W.* 858; *Rigge v. Burbidge*, 15 *M. & W.* 598; *Davis v. Hedges*, *Law Rep.* 6 *Q. B.* 687; *Bascom v. Manning*, 52 *N. H.* 132; *Basten v. Butter*, 7 *East.* 479; *Benj on Sales*, sec. 899.

But a distinction has been sought to be drawn between cases of warranty or for work and labor and the present case, which is a suit for an alleged breach of contract to furnish timber of

a certain quality, but we think none exists in principle between this and a suit to recover damages for a breach of contract for work and labor on account of the insufficient or inferior character of the work done. The case of warranty, inasmuch as it technically applies only to a thing *in esse* and ascertained, stands upon the ground that the warrantee having by the nature of the contract the property in the thing sold and delivered to him which he cannot reinvest in the vendor without his consent, is drive to his action to recover damages for the breach of it, and therefore to avoid circuity of action in such a case he shall be allowed in the action by the vendor and warrantor against him for the price of it to show the breach of the contract and warranty by him in reduction of the damages demanded by him, or even to defeat his recovery entirely. And yet cases of breach of contract for work and labor have been put precisely upon the same ground, and for the obvious reason that the party sued would otherwise have been deprived of the benefit of such a performance of the contract as he might have been willing under the circumstances to put up with rather than not have the work done at the time. This appears by the case of *Davis v. Hughes*, decided as late as the summer of 1871 by the Court of Queen's Bench in England as reported in 6 *Law Rep.*, for it is there stated by Hanon, Judge, who delivered the opinion of the court, that the law is the same in the case of a contract for the delivery of chattels of a particular quality.

This is not a case of warranty, for a warranty in its strictly legal and technical sense, as we have before remarked, can only be made of things ascertained and existing, so as to be seen and inspected at the time of the contract, such as a ship, a horse, a machine, or other existing chattel, may be warranted to possess certain qualities, and if it is falsely done damages may be recovered for the breach of it; but an agreement to perform work and labor in a particular manner or to furnish articles or materials of a particular quality is not a warranty technically speaking; it is none the less, however, the subject of an action at law for a breach of it than a warranty is, and the form of the action is the same in either case—covenant if it be under seal, or *assumpsit* if it is not. Now, is there any reason

why a party sued for the price of work and labor performed for him and which he accepted, or for the price of materials to be sold and delivered to him of a particular quality and which were received and accepted by him, although they may not have been of the stipulated quality, should not have a right to sue for the breach of such a contract by the other party to it, as well as the warrantor who has accepted and retained the article warranted has a right in such a case to sue the warrantor for a breach of the warranty? It would seem not, except the very technical one founded on the distinction that in the latter case the property in the article vested in the warrantee on its acceptance by him, and he cannot rescind the contract so as to reinvest the property in it again in the warrantor without his consent. Should such a reason and such a distinction be allowed to seriously interfere with what now seems to be the settled policy of the law alike in all these cases, to allow the counter claim of the defendant for damages for a breach of the same contract by the plaintiff, to be given in evidence in the action in reduction of the damages claimed by him in it, and if sufficient even to counterbalance them?

But it is insisted by the counsel for the defendant that this case stands upon a different footing from that of a case for a breach of warranty or that of a case on a contract for the price of work and labor, inasmuch as the furnishing in this case of first-class Delaware white oak was a condition precedent to any right of action on the part of the vendor, the defendant, to recover the contract price of the timber, and that by accepting and using and voluntarily paying much the larger part of the contract price for it without any objection to the quality of it, and afterward suffering judgment to go against him in this court for the balance of the contract price of it without any defense whatever, the plaintiffs confessed that this condition precedent of the contract had been performed and complied with by the defendant, and that they were thereby estopped in this court from pretending or alleging that it was not of the stipulated quality, and that it constituted on their part what is denominated acquiescence in the performance of the condition of the contract by the defendant, for which they refer to 2

Stark. Ev. 879. But this will not be the first time that the soundness of that position and the inference of Mr. Starkie in relation to it has been questioned, for from the remarks of Justice Hanon in the case before referred to by us it appears that such a plea or defense does not now avail in such a case as this in England, and should not, we think, be allowed here, but that the rule on this point which prevails in cases of warranty and in cases of contracts for work and labor ought also to apply to a case like this, of a contract to furnish lumber or materials of a specific kind or quality at a stipulated price, and that the latter should stand on the same footing as the former, and we decide accordingly. The law, then, is to be taken to be that as well in actions for the non-payment of the price of goods sold and delivered under a contract as in actions for goods sold and delivered with warranty, or in actions for the price of work and labor done under a contract, the defendant may at his election either avail himself of any breach of the contract by the plaintiff causing damage to him in reduction of the damage claimed and sustained by the plaintiff from any breach of it by him, or he may sue the plaintiff for the same independently, and the former suit and recovery against him shall be no bar to the latter unless in the former suit he had availed himself of his right and privilege to prove and claim the amount of such damage in reduction of the amount of damages demanded by the plaintiff in it from him.

COUCH & CO. v. GEORGE B. MONEY.

On affidavit and copy of the cause of action filed judgment given, notwithstanding the affidavit of defense filed, alleged that the promissory note which was the cause of action was given by the defendant to the plaintiffs for goods sold and delivered, and by mistake the amount of it was in excess of the value of the goods, and he has paid them in full for the actual value of them.

ASSUMPSIT on a promissory note. Affidavit and a copy of the cause of action filed and motion on behalf of the plaintiffs

for judgment notwithstanding the affidavit of defense filed alleged that the note was made by the defendant to the order of the plaintiffs for goods sold and delivered to him by them, and that the amount of it through mistake was in excess of the value of the said goods and that the defendant has paid the plaintiffs in full for the actual value of said goods and for the amount legally due on said note.

The Court gave judgment for the plaintiffs upon the motion.

JAMES G. KNOWLES *v.* SAMUEL C. PIERCE.

Neither the raw material furnished by another to the tenant of a woolen factory to be woven into flannel for him at a stipulated price per yard nor the fabric when made, on the demised premises, are subject to distress for rent due the landlord and in arrears for the past year, or to the landlord's attachment for the rent growing due the current year; but they both have a preference as to other goods on the premises belonging to the tenant over attachments against him for wages due the hands employed in the factory. In an action of replevin each party may be an actor. If the goods have been replevied and the plaintiff prevails in it he is entitled to nominal damages, and also his costs; but if the defendant prevails in it he is entitled to a return of the goods or to damages to the value of them and also his costs. If a verdict be found that a part of the goods replevied were the property of the plaintiff and a part were not, each party must be considered as prevailing to that extent respectively, and the verdict must so be in favor of each of them respectively; and as each party has judgment upon it for his damages, either nominal or substantial, he is so far a prevailing party and must also have his costs.

REPLEVIN for sundry goods and chattels in a woolen mill or factory the property of E. I. du Pont & Co. and in the tenure of Frank S. Urie, lessee, distrained for one year's rent due the landlords, and taken on their attachment for a year's rent growing due, and on numerous foreign attachments against Urie, who had left the State, sued out by hands in the mill for wages due them. The goods were replevied on the writ and delivered by the sheriff to the plaintiff, who was living and doing business in Philadelphia, and consisted of an arm-chair, a walnut desk, all warps in the

mill, or on or off the looms, all flannels, all the cops filling in or about the mill, all wool filling in yarn about the mill, and all weavers' or other waste, either cotton or wool. The defendant was a constable, who had taken the goods on the distress and attachments.

The evidence was that Urie was the lessee of and running the mill in 1874, and was engaged in weaving in it cotton and woolen shirting flannels for others out of materials furnished by them at a stipulated price per yard, and in May of that year entered into an agreement with the plaintiff to weave flannels of that kind for him out of stock or materials to be supplied by him for that purpose, and was so engaged in weaving for him all the summer and fall until he was stopped in his business by a foreign attachment in the month of September; and when made the goods were all the property of the plaintiff, and the only property which he had in them was his lien on them and right to retain them in his possession until he was paid for making them. It also appeared in evidence that he was the brother-in-law of the plaintiff, and the owner of the arm-chair and walnut desk among the goods before mentioned. There were three hundred dollars due and in arrear to the landlords for one year's rent of the premises, for which the distress had been made, and three hundred dollars for the current year's rent then growing due for which a landlord's attachment had been issued. The goods were valued at one thousand four hundred and fifty dollars.

The Court, Comegys, C. J., charged the jury: The defendant in the action, who was the constable who served the attachments in the case, avows or admits the taking of the goods in question as the property of Frank S. Urie, the tenant of the woolen mill or factory spoken of in which they all then were, and justifies the taking of them under the writs as his goods; the plaintiff, however, claims that he was then the absolute and rightful owner of them, and if by an agreement between him and Urie he furnished the raw materials for the purpose, and Urie was to manufacture them into flannels for him at an agreed price per yard, then he was in law the owner of them and would have

been entitled to take them away on paying the price for the weaving of them. The jury had heard the evidence in the case, and the only question to be considered and decided by them was the ownership of the goods and to which of them did they then belong, whether to the plaintiff, James G. Knowles, or to Frank S. Urie. There were two articles, however, included among the goods taken which stood upon different grounds, and they were the arm-chair and the walnut desk, which, according to the only testimony submitted with reference to them specially, were also furnished by the plaintiff to Urie, but were to be his own property when he paid the plaintiff for them, which he had not yet done. For if upon the evidence the jury should conclude that the flannel and the materials then being used in the making of it, taken on the distress warrant of the landlords for the year's rent then due and in arrear, and also on their attachment for the next year's rent then growing due, were then the property of the plaintiff and not the property of Urie, and were in the possession of the latter upon the premises in question in the way of his trade or in the regular course of his occupation or business then carried on there, to be manufactured into flannels for the plaintiff, then, under the provision of the statute in such case made and provided alike for the encouragement of trade and the protection of the rights and interests of the owner of the property under such circumstances, such goods were exempt from seizure and could not be taken under either process by the officer having them in hand, that is to say, either under the distress warrant of the landlords for the year's rent of three hundred dollars then due and in arrear or under their attachment for the like amount of rent then growing due for the current year. But under the statute that exemption did not apply to the arm-chair and walnut desk on the premises, if the jury should be of opinion upon the evidence in regard to them that they were then the property of the plaintiff, for if they were then his property and not Urie's they were lawfully subject to such process and to be taken on either and both of them. On the contrary, however, if you should be satisfied from the evidence that all or any part of the goods in question were then the property of Urie and not of the plaintiff, then all or such parts of it as

you find belonged to him would be subject to either process and to both of them, and were properly taken by the officer under them for the rent mentioned.

There were also thirty-one foreign attachments, issued at the suits respectively of as many hands employed in the factory, against Urie for the wages then due them, in the hands of the same officer and the defendant on the record in this action, on which all of the same goods now in question were taken by him as the property of Urie and liable for his indebtedness to them, but if the whole or any part of them were then the property of the plaintiff, the whole or the part of them which belonged to him as his property was not legally liable to be taken on any one of these attachments, not even the arm-chair and walnut desk, although if those two articles belonged to the plaintiff and were then upon the demised premises they were subject to be taken on the distress warrant for their year's rent then due and in arrears to the landlords, and also to be taken on their attachment for their year's rent then growing due; but in that case they would not be liable, as we have before said, to the attachments of the hands, owing to a well-known and long-established difference and distinction which the law itself makes between claims for rent and claims for any other kinds of indebtedness under such circumstances and the preference which it consequently gives to claims for rent over them. If then all the goods but the chair and desk were the property of the plaintiff and in the possession of Urie and upon the premises for the purpose before stated, they were not subject to any of the writs under which they were taken by the defendant, and the verdict of the jury should accordingly be in favor of the plaintiff; but if the chair and desk were his property and were then on the demised premises, for the reason before stated, they were subject to be taken by the defendant, and it was his duty to take both on the distress warrant of the landlords and their writ of attachment for rent, but not on any of the other writs of attachments in his hands, then so far as those two articles are concerned in the case their verdict should be in favor of the defendant, and as the goods were all replevied under the writ with which this suit was commenced, for the return of them to the defendant, if they can be found, but if not

then for damages for him to the value of them. If, however, the jury should believe from the evidence that all of the goods in question were then the property of Frank S. Urie, the tenant of the factory, and not the property of the plaintiff, then they were subject to be taken on all of the writs in the hands of the defendant, and in that case their verdict should be in favor of the defendant with a like return of all of the goods to him or damages in his favor to the value of them; or if they should believe from the evidence that any part of them, the chair and desk, for instance were the property of Urie and not of the plaintiff, then their verdict should be for the defendant with a like return of them to him or damages in his favor to the value of them. If the verdict should be for the plaintiff, as all the goods were replevied and restored to him under the writ of replevin, they should award him nominal damages merely; but if they should find on the basis of the instructions already given them that any part of the goods were the property of the plaintiff, but were not liable to be taken on any process in the hands of the defendant, and that another part of them were the property of the plaintiff, and were liable to be taken on any process in the hands of the defendant, then it would be the duty of the jury to return a verdict in favor of the plaintiff for nominal damages in regard to the part of the goods first mentioned, and in favor of the defendant in regard to the part last mentioned, and for a return of the same to him, or for damages to the value of them if they cannot be returned, for in replevin each party may be an actor. If the goods have been replevied and the plaintiff prevails in the action he should have by our practice nominal damages and also his costs; but if the defendant prevails he should have a return of the goods, or damages to the value of them and also his costs. If a verdict be found that part of the goods were the property of the plaintiff, and a part were not, each party must be considered as prevailing to that extent respectively and the verdict must so be in favor of each of them respectively, and as each party is to have judgment upon it for his damages, either nominal or substantial, he is so far a prevailing party in the action and must also have his costs. *Powell v. Hinsdale*, 5 Mass. 342; *Winnard v. Foster*, Lutw. 1190; *Clark v. Keith*, 9 Ohio 72; *Poor v. Woodburn*, 25 Vern. 234.

The verdict of the jury was in favor of the plaintiff for six cents costs besides the costs expended, and also for the defendant, and they assessed his damages at twenty-five dollars, according to which judgments were entered for each of the parties for their respective damages; and on motion the court allowed the plaintiff all his costs, and the defendant the appearance fee of his attorney, two dollars and sixty-seven cents.

Gray, for the plaintiff.

Lore, for the defendant.

JAMES D. RHOADS v. ARCHIBALD GIVEN.

The statute of March 15th, 1875, in relation to the lien of taxes, provides that the lien of a State or county tax on the real estate of a taxable shall, for and during the year it is imposed, be paramount to all other liens upon it. To secure this priority, however, of the lien of a county tax assessed during the year on the real estate of a taxable over the lien of a mortgage of it to a creditor on which it had been sold during the year on a *levari facias* and the proceeds of the sale brought into court by the sheriff, the assessment of the tax simply was not sufficient, but it was necessary that the collector of the tax should have duly levied it on the real estate before the same had been converted into personalty by the sale under the *levari facias* on the mortgage.

At this term the sheriff had obtained leave and deposited the sum of ninety-seven dollars in court, which by virtue of a certain writ of *levari facias* at the suit of James D. Rhoads v. George L. Garsed, issued out of this court to the present term, and upon which he had set up and sold on the 13th day of November instant to the plaintiff for the sum of twenty-five thousand dollars the real estate in the said writ mentioned, he had received as part of the said sum paid to him as sheriff, and which sale had been returned to this court at the present term. And that at the time and place of the said sale Archibald Given, Esq., County Tax Collector for the Northerly Collection District

of the city of Wilmington, in which said real estate was situated, gave verbal notice to him as sheriff that he had a claim against said real estate for a county tax amounting to ninety-seven dollars assessed or imposed by the levy court of the county for the present year of 1876 against the said George L. Garsed, the mortgagor and defendant in the said writ of *levari facias*; but he, your petitioner, is not advised that any actual levy by attachment, sequestration, execution, or other process for making or securing the said tax was ever made upon the said real estate, or upon any part thereof. He further represents at the court that the mortgage under which it was sold at said sale was for the purchase-money, and bears date October 8th, 1870, and was recorded in the recorder's office of this county on the 11th day of October, 1870. And having been notified by the attorney of James D. Rhoads, the mortgagee and plaintiff in said writ of *levari facias*, who is entitled to the whole of the fund in hand arising from said sale after deducting the charges to which the same is legally subject, not to retain the amount of tax so as aforesaid claimed by the said county tax collector out of the said proceeds of sale and not to pay the same to him or to any other person by reason of said claim, denying the validity thereof as against said mortgage debt, and claiming and demanding said amount as part of the proceeds of said sale to which said plaintiff is entitled by virtue of his said mortgage and the lien thereof upon said real estate and the proceeds of the said sale. The petitioner would further represent that the sum appearing by the said writ of *levari facias* and claimed by the said plaintiff to be due to him is thirty thousand dollars. And the petitioner, being advised that it would not be safe for him to pay it over under such circumstances, prays leave to pay the said amount of ninety-seven dollars into court, etc.

This was followed by a petition from James D. Rhoads, the plaintiff, alleging the same facts substantially and submitting that he was entitled to have the said amount so paid into court paid out to him, and praying that it might be so ordered by the court, upon which a rule was laid on the said Archibald Given, Esq., County Tax Collector for the Northerly District of the city of Wilmington, to show cause wherefore the said amount

should not be paid to the said James D. Rhoads, the said mortgagee and plaintiff in the said writ of *levari facias*.

Gray, for Given, defendant, in the rule, now showed cause: By virtue of the act of the General Assembly, passed on the 15th day of March, 1875, in relation to the lien of taxes, the lien of the State or of a county for a tax imposed is for the year paramount to any and all other liens on any real estate bound by it. The words of the act are that taxes imposed by the levy court of a county or by the State for its own purposes shall have priority of lien upon real estate, provided the same shall have been duly levied before such estate has been converted into personal property by sale under legal process. This provision shall not extend to more than the taxes of the year when the conversion takes place, nor shall it avail unless notice of the claim for taxes be given to the person making the sale at least fifteen days before the return of the process on which the sale was made, if there be so many days before such return. From this it is apparent and palpable that the lien of a State tax or county tax imposed by the levy court on any real estate for the year is for and during that year paramount to any other whatever binding upon it and is the first to be paid out of the proceeds of the sale of it by the sheriff or other officer selling it on legal process; and such has been the practice of the sheriff in this county, at least, whenever notice of the claim for it has been served upon him by the tax collector fifteen days before the return of the process on which the same had been sold by him. And this is the rule and the practice where the provisions of the law are similar in other States. *Black on Tax Levies* 154.

Patterson, for the plaintiff in the rule: The question in this case is whether the simple act of imposing or assessing the tax on the real estate by the levy court merely, without any levy of it afterward by the collector of it on the real estate itself and before the conversion of it into personal property by the sale of it under the legal process, is sufficient to constitute, fix, and establish the lien of the tax on the real estate so as to give it the paramount and extraordinary priority claimed for it on the

other side under their construction of the act, but which we contend is not the correct construction of it.

Gray: While the term taxes "imposed" by the levy court of a county or by the State is as broad and comprehensive a term as could be employed, and clearly includes any and every tax laid by the authority of either, the term duly "levied" or assessed is far more frequently employed both in legal proceedings and in ordinary speech in the same broad and comprehensive sense, and is often employed perhaps, in both ways to express the assessment or imposing of it by the assessor subject to the review and sanction of it by the levy court, as the collection of it by the collector afterward; and an annual imposition of county taxes is as often called, and probably more frequently in ordinary conversation by the community in general, a tax levy than a tax assessment, while Webster in his definition of the word levy, when employed in relation to taxes, recognizes it as possessing either or both meanings.

The Court: We think the legal definition of the word *levy*, both as a verb and a noun, given by Mr. Webster in his dictionary when employed in relation to a public tax has reference rather to the collection than the assessment of it. But when we turn to our own statute establishing the constitution and defining the general powers of the levy court in each of the counties, we find there are certain provisions in it which we think clearly and conclusively indicate the sense in which the legislature used the term *levied* in contradistinction to the term *imposed* in the act now under consideration. One of the law definitions of the word *levy* given by Mr. Webster, is "The taking or seizure of property on executions to satisfy judgments, or on warrants for the collection of taxes; a collecting by execution." The provisions in our general statute to which we have before referred are in the 17th and 18th sections of it, the first of which provides, among other things, that "the levy court in each county shall sit as a court of appeal on the first Tuesday of March in every year, and on such days and times thence in said month ensuing as it shall be necessary to adjourn to, and shall examine

the assessments returned by the assessors, and the corrections thereof and additions thereto that may have been made, and shall receive, hear, and determine appeals against the same." *Rev. Code* 62. And the second of which provides also, among other things, as follows: "And the said court shall on or before the first Tuesday of April in every year cause to be issued to the collector of each hundred a duplicate of the assessment list of the hundred of which he is collector, with a warrant thereto annexed under the hands of two or more of the levy court according to this form: 'We command you that you collect from the several persons named in the duplicate annexed for their poor, road, county, etc., taxes, etc., etc., etc., and if any person named in said duplicate shall not pay the said rates in ten days after you have demanded the same, we command you in such case that you levy and make the said rates or the part thereof remaining unpaid, with lawful costs, in the manner prescribed by law.'" *Rev. Code* 63, 64. And that will be found in chapter eight of the revised statutes in relation to collectors which makes it the duty of the collector, if any person shall fail to pay to him in ten days after the demand the whole or any part of his tax, to levy and collect the same with costs, by distress and sale of his personal property, ten days' notice of such sale to be given by advertisements posted in four of the most public places of the county, two of which must be in the hundred of the collector. But if the owner of any real estate shall not reside in the hundred or shall be a minor, or shall fail to pay the tax thereon in ten days after demand, it shall be the duty of the collector to levy and collect the same with costs by distress and sale of the personal property of the tenant thereof if payment be not made by such tenant in ten days after demand by the collector, the like notice of such sale to be given by advertisements as before provided. Or if the collector shall not be able to find personal property of taxables or their tenants sufficient to pay the taxes against such taxables he shall have power after the first day of September next following the date of his warrant to levy and collect such taxes from the lands and tenements of such taxables. And then follow several other special provisions for the collection of such taxes by him

out of the lands of such taxables, with the order in which they are to be pursued by him under the command and authority of his warrant to levy and collect the taxes committed to him for collection. *Rev. Code, secs. 11, 12, 13, p. 88.*

And it is worthy of remark that in each of these sections of the statute last referred to, whenever provision is made for the collection of them by the summary process of legal execution without suit or judgment, with which power and authority every such tax collector is expressly invested by law, the terms employed invariably are, "it shall be his duty *to levy and collect* the same, with costs, by distress and sale of the personal property of every defaulter made subject to such execution process," and which, in the uses of the law at least, is unquestionably the most appropriate and correct sense in which the term *levy*, either as a verb or a noun, can be employed when it is thus applied, for in its legal application to process of execution it has no exact synonym in any other single word in our language. And as these statutes are all in *para materia*, the meaning of the phrase as employed in the act of March 15th, 1875, we have no doubt is that the tax in this case should have been duly levied in some one of the methods prescribed in the provisions of the other statute to which we have referred, on the personal or real property of the owner and taxable in question before his real estate bound by the mortgage had been converted into personal estate by the sale of it under the process of *levari facias* upon it by the sheriff, in order to give the claim for the county tax against him in the hands of Given, the collector, a priority of lien upon said real estate over that of the mortgage. We therefore order the rule in this case to be made absolute.

SUPERIOR COURT.

SPRING SESSIONS.

1877.

JOHN STEWART *v.* JOHN H. APEL.

The renting of premises by an agreement in writing, but not under seal, for a term of five years, is effectual only as a demise for one year, but if continued without notice from either party to terminate the holding for the five years it becomes in effect a parol demise from year to year during the holding, and in *assumpsit* on the agreement by the landlord against the tenant for not repairing the premises in the meanwhile, each parol demise from year to year becomes a distinct and complete cause of action, and will be barred after three years by the statute of limitations.

ASSUMPSIT upon a written agreement, but not under seal, by which the defendant, who alone signed it, rented from the plaintiff certain premises, consisting of a dwelling, candy shop, and bakery in Milford, for and during the term of five years from the 1st day of January, 1865, to the 1st day of January, 1870, and was to do all the repairs on the premises at his own expense, except to the bake-oven and pump, and for which he was to pay a rent of one hundred and seventy-five dollars per annum in three months' installments, and to deliver at the expiration of said term the said premises with all the improvements and appurtenances thereunto belonging to the plaintiff. The defendant held the premises during the term or time limited in the agreement and then surrendered them after giving three months' notice in writing of his intention to do so to the plaintiff. The action was commenced on the 28th day of December, 1872, and was for neglecting to keep the premises in repair. The declaration con-

tained ten counts, and the first five of them respectively were for a breach of the agreement in that respect during each of the five years of the holding, and among other pleas the statute of limitations was pleaded. The testimony as to the repairs was very contradictory, and the counsel for the defendant contended that there was no evidence that they had been neglected during the last year of the holding.

Watson, for the plaintiff: Under the provisions of the statute, *Rev. Code 707*, no demise, except it be by deed or lease under seal, shall be effectual for a longer term than one year, and by virtue of it this became a good demise for the first year, but it further provides that if there be a demise for a term of one or more years, and three months or upward before the end of the term either the landlord do not give notice in writing to the tenant in possession to remove, or the tenant do not give like notice to the landlord of his intention to remove from the demised premises, the term shall be extended for another year, for which the tenant shall pay the rent and all the stipulations of the demise shall continue in force. And as by the operation of these two provisions the valid demise for the first year was continued without notice from either party to terminate it, for each successive year until the close of 1869, it became in effect a good demise from year to year for the five years limited in the agreement with all the stipulations contained in it for each of those years. *Doe d. Rigge v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3; *Stewart v. Apel*, 4 Houst. 314; *Hill v. Woodman*, 14 Maine 38; *Richardson v. Gifford*, 28 E. C. L. Rep. 35; *Barlow v. Wainright*, 28 Verm. 88; *Lockwood v. Lockwood*, 22 Conn. 425; *Beal v. Sanders*, 3 Bingh. N. C. 850.

Lofland, for the defendant: This was under the operation of the statute a parol demise from year to year for a period, as it turned out, of five years from January 1st, 1865, to January 1st, 1870, and there were five separate counts in the declaration so laying the demise for each one of the five years and alleging the breach of it in each one of them in the same manner. There are, therefore, so many separate and distinct causes of actions

joined in one action of *assumpsit* on a parol demise from year to year, and the statute of limitations is pleaded to it. The first cause of action accrued January 1st, 1866, the last January, 1st, 1870, and the suit was not brought until December 28th 1872, and all for the first four years are barred by it, while there was no evidence that the repairs were neglected during the last year, 1869.

The Court, Comegys, C. J., charged the jury: That under the written agreement, which was without any seal, and the provision of the statute applicable to it, the demise was effectual for the first year only in itself considered, but having been continued by the consent of both parties from year to year from the close of that year, 1865, to the last of the year of 1869, it became in effect from its beginning a demise from year to year till that time, and also a distinct demise for each of those five years, with an extension and re-extension of all the stipulations expressed in the written agreement to each of those demises in succession throughout the period of the holdings, and each demise constituted a distinct and complete cause of action in itself or five of them joined in one suit; but as the suit had not been brought until the 28th day of December, 1872, and the statute of limitations had been pleaded to it, they could allow the plaintiff no damages for any breach by the defendant of the stipulation to all the repairs on the premises if any neglect on his part to do so had been proved to their satisfaction which had occurred at least three years before the suit was commenced, nor any damages or verdict whatever for the plaintiff unless they were satisfied from the evidence that the defendant had neglected to do the repairs upon them between the 28th day of December, 1868, and the termination of the holding with the year 1869, and for which, if they were so satisfied, it would be their duty to return a verdict in his favor for such damages only as that evidence shows that he had sustained. Otherwise their verdict should be for the defendant.

The plaintiff had a verdict for seventy-two dollars.

WATERTOWN STEAM ENGINE COMPANY *v.* JAMES B. DAVIS.

Conditional sales of personal property are valid in this State; and where delivery of property is made upon agreement that no title shall pass until payment is made or some thing is done or occurs, no title passes to the party to whom it is delivered until such payment is made or such thing is done or occurs, and he can pass none to his vendee, no matter how ignorant of the contract such vendee may be.

If such property consists of machinery and is placed by the purchaser permanently on his land, yet if its identity can be shown to be that of the property bargained for, the conditional vendor on failure of payment can enter on the premises and remove it and repossess himself of it, provided such be the bargain between the parties; and he can recover a reasonable compensation for the use thereof if such also be the bargain.

Bargains and sales made by an agent of a manufacturing company within the scope of his authority bind the company, but if a special agency existed by which he was restricted to a certain mode of dealing, it would not bind the purchaser unless it was communicated to him before he erected the machinery on his freehold.

Knowledge of any such special agency or conditional bargain and sale of machinery by the company to a purchaser who erects it on lands bound by a mortgage recorded before the machinery went upon the premises, on the part of the mortgagee, cannot effect the lien of his mortgage upon the machinery if it has thereby become a fixture of the premises bound by it, unless it can be shown that the mortgagee agreed that it should be exempted from it, or so conducted himself with respect to the matter as to mislead and deceive the company into the belief that it would not bind it, for in that case he would have been guilty of a fraud, which the law would not tolerate.

THIS was an action of trover for a horse-power stationary engine complete, and an iron frame saw-mill with all the fixtures and appurtenances thereunto belonging, sold through an agent of the company which manufactures them in the State of New York, Mr. George S. Grier, of the town of Milford, in this State, to Mr. Solomon Holmes, of that place. The terms and conditions of the sale were embraced in the following receipt of Holmes, dated March 24th, 1873, and witnessed by the agent, Grier, and another: "Received of the Watertown Steam Engine Company one twenty horse-power stationary engine complete, and one No. 3 iron frame saw-mill, with all the fixtures and appurtenances thereunto belonging, delivered to me this day

under a bargain for the sale thereof, and for which I have given my notes for thirteen hundred and seventy-five dollars, payable at the office of discount and deposit of the Smyrna Bank, in Milford, Kent County and State of Delaware, with interest. And it is expressly understood that the said Watertown Steam Engine Company neither parts with, nor does Solomon Holmes acquire, any title to said property until said notes and all extensions and renewals thereof are fully paid. And it is expressly understood that Solomon Holmes is not to remove said property from his premises in Milford, Delaware, without the consent of the said Watertown Steam Engine Company; and in case of default in the payment of the said notes at maturity or any of the payments thereon, with interest, the said Watertown Steam Engine Company are authorized to enter his premises and take and remove said property and collect reasonable charges for the use of the same."

The engine and saw-mill had been ordered by the agent, Grier in the month of September preceding and had been delivered to Holmes by him in Milford, at the price of two thousand four hundred and seventy-five dollars, five hundred dollars of it to be paid in cash on the delivery of them to him, and the balance in four notes at three, six, nine, and twelve months respectively. Homes at once proceeded to erect them on a lot in the town which he had previously purchased of James B. Davis for the purpose on credit, securing the purchase-money to him by a mortgage upon it. But when the notes of Homes were transmitted by Grier to the company they were not satisfied with them, as they expected him to take the notes to his own order and indorse them to the company, which he declined to do, and they afterward took from him the receipt above stated for the balance with the written terms and conditions of sale as expressed in it.

There was a granary on the lot when Holmes bought it of Davis which he converted into a grist-mill to be run with the saw-mill by the steam engine, the engine being placed on a bed-piece twelve inches below the surface of the earth through which large upright iron rods or bolts were run with taps on the lower and screws on the upper ends, and around them brick

pillars were constructed, on which it was securely fastened by taps over the screws, but from which the engine could at any time be removed by unscrewing them without disturbing the bed-piece or brick pillars on which it rested. The foundation on which the boiler was placed was the same, except that it was made a little higher. The surface of the earth was leveled off carefully, on which stringers were laid lengthwise across sleepers placed on the ground, and upon that the carriage of the saw-mill was laid and worked, and the only excavation which it required in the earth was the open pit over which the circular saw revolved and into which the sawdust fell.

The first note, which was for five hundred dollars, was afterward paid by Holmes, but the others were never paid, and two years afterward Holmes died insolvent, and Davis afterward sued out a *levari facias* on his mortgage on which he sold the lot and premises, and of which he became the purchaser at the sheriff's sale; subsequently Grier recovered a judgment against Holmes on which he sued out a *fi. fa.* execution, had it levied on the saw-mill and steam engine as the personal property of Holmes, and bought them at the sheriff's sale, but both the company and Davis forbade publicly the sheriff's sale of them, each claiming to be the owner of them and denying that they belonged to Holmes' estate, but Grier never attempted to take possession of them under his purchase. It was also proved on the trial that Davis was aware from the first of the terms and conditions on which the company had sold them to Holmes and that Holmes had failed to comply with the terms and conditions of the sale. The same were afterward demanded by them from Davis, and on his refusal to deliver them this action of trover was brought to recover for the conversion of them.

Robinson, for the plaintiffs: The case involves a question of law which has never been decided in the courts of this State. This was a conditional sale of the goods in question (a stationary steam engine and the machinery belonging to it), sold by the plaintiffs to Solomon Holmes on the special terms clearly expressed in it, and as such it was a valid sale, even as against a subsequent *bona fide* purchaser of the goods without notice of the

condition. *Benjamin on Sales*, sec. 320; *Story on Sales*, sec. 313; *Myers v. Solsby*, 2; *Mod.* 242; 2 *Kent Com.* 380; *Barlow v. Cole*, 3 *Campb.* 91; *Barrett v. Prichard*, 2 *Pick.* 512; *Hussey v. Thornton*, 4 *Mass.* 404; *Ire v. Bartlett*, 6 *Pick.* 71; *Reed v. Upham*, 10 *Pick.* 522; *Witwel v. Vincent*, 4 *Pick.* 449; *Sargent v. Metcalf*, 5 *Gray*, 306; *Strong v. Taylor*, 2 *Hill*, 326; *Brewster v. Baker*, 20 *Barb.* 364; *Ford v. Marsh*, 15 *Conn.* 397; *Park v. Carpenter*, 24 *Conn.* 426; *Hotchkiss v. Hunt*, 49 *Maine* 213; *Smith v. Foster*, 18 *Vt.* 182; *Clark v. Wells*, 45 *Vt.* 4; *Duncan v. Doan*, 45 *Vt.* 118; *Paris v. Robbins*, 12 *Ired.* 268; 27 *Missouri* 45; *Little v. Page*, 44 *Missouri* 412; *Hunter v. Wainer*, 1 *Wis.* 141; *Williams v. Connaway*, 3 *Houst.* 63. In all sales, except in market overt, it is incumbent upon the vendee of the goods to see that the vendor has a good title to them. *Lesleman v. Mackin*, 3 *E. C. L. Rep.* 359. But in this case it is clearly proved that the defendant had notice of the conditional terms on which the engine in question was sold to Holmes by the plaintiffs when he, the defendant, bought it. The character which personal property is to have when fixed to and upon land depends upon the intention of the parties owning the chattel and owning the land with respect to it, and may be determined by agreement between them. *Wood v. Huey*, 55 *E. C. L. Rep.* 913; 2 *Smith's Ld. Ca.* 219, 221, 222, 223. And actual notice to the subsequent purchaser of the land of the right of the vendor of the chattel to sever it from the land on a breach of the condition of the sale will bind him, notwithstanding it has been so affixed to the freehold as to become a fixture in law, but for the conditional sale of it in such case, because it matters not what may be the nature of its attachment or annexation to the soil, it does not become fixture in law if by the agreement between the owner of the chattel and the owner of the soil the owner of the chattel shall have the right to sever and remove it from the soil. *Doty v. Warren*, 5 *Pick.* 487; *Smith v. Benson*, 1 *Hill* 176; *Goddard v. Gould*, 14 *Barb.* 662; *Haven v. Emory*, 33 *N. H.* 66; *Wade v. Johnston*, 25 *Gray* 331. The rule of the common law is that where the article in question can be removed without essential injury to the freehold it is not a part of the freehold. *Dane v. Dane*, 38 *N. H.* 439; *Coleman v. Lewis*, 27 *Penna.* 299; *Meigs'*

Appeal, 62 *Penna.* 28; *Hilborn v. Brown*, 12 *Maine* 162; 26; *Iowa* 156. In this State a mortgagee out of possession of the premises is not the owner of the land, but only the holder of a lien upon it. *Doe d. Hall v. Tunnell*, 1 *Houst.* 320. And such lien does not bind any personal property annexed or attached to the land not deemed in law fixtures, and as such parts of the reality. 46 *Barb.* 242. And no subsequent mortgagee or purchaser of the land with notice that such personal property was affixed to it with the right reserved to the owner of it to remove it from the land will take any title to it. *Hill v. Semale*, 53 *Penna.* 71; 10 *Kans.* 314. And none of these decisions are inconsistent with the case of *Rice v. Adams*, 4 *Harr.* 332.

Lofland, for the defendant: The extreme doctrine as to conditional sales contended for on the other side has never been recognized as law in this State. On the contrary, the true doctrine, as has been ruled in some of the other States, we hold to be this: if goods be sold and delivered to the purchaser, notwithstanding it is on the condition that the purchaser shall give the vendor a note with security for them on the following Monday; and on that being done the goods to be the property of the purchaser, it is not a conditional, but an absolute sale of them. *Brundage v. Camp*, 21 *Ill.* 330. And this is upon the ground that where one of two innocent persons must suffer loss in such a case the loss should fall on the one who by his imprudence has put it in the power of a third person thereby to defraud the other. *Harris v. Smith*, 5 *Sarg. & Rawle* 20. A purchase which is not explained must be deemed adverse to the vendor and an absolute sale to the vendee. *Dubois v. Marshall*, 3 *Dana* 328; *Carriway v. Wallace*, 2 *Ala.* 542; *M. C. R. R. Co. v. Phillips*, 50 *Ill.* 191; *Jennings v. Gage*, 13 *Ill.* 610. The conclusion in these cases is that though the sale of goods may be conditional as between the vendor and vendee, yet when they have been sold and delivered upon a substantial condition afterward to be performed by the purchaser, but not performed by him, which would be the effect of the delivery as between them, nevertheless, if such purchaser sells them to another for a valuable consideration without notice of the condition it will vest the

legal ownership of the goods in such *bona fide* purchaser. All fixtures for the time being belong to the freehold and constitute a part of the realty; and as between vendor and vendee, mortgagor and mortgagee, the heir and the executor, the rule is the same in reference to them. *Preston v. Briggs*, 16 Vt. 124. Fixtures erected by the mortgagor on premises previously mortgaged by him will inure to the benefit of the mortgagee. *Burnside v. Twitchell*, 43 N. H. 390. Fixtures attached to the freehold cannot be sued for as goods sold and delivered. *Lee v. Risdon*, 2 E. C. L. Rep. 69; 12 N. H. 205; 17 Vt. 403. All buildings erected on mortgaged premises which enhance the value of the real estate become a part of it and are bound by the mortgage. *Butler v. Page*, 7 Metc. 40; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306; *Sweetzer v. Jones*, 35 Vt. 317; *Sned-acre v. Warring*, 2 Ker. 170; *Burnett v. Harris*, 20 Barb. 407; *McKim v. Kennedy*—3 Md. Ch. Decis. 186. Fixtures are a part of the freehold whether attached to the land or not, as between the vendor and vendee. *Morchus v. Freeman*, 2 W & Sar. 116. The rolls of a rolling mill and the iron plates covering the floor are a part of the freehold. *Pyle v. Pennock*, 2 W. & Sar. 300. A chattel mortgage, though made prior to a mortgage of the real estate, will not protect fixtures against a vendee of the real estate without notice of it. *Bringhoff v. Mulzeebee*, 20 Iowa 513. The case cited on the other side from 46 Barb. 242, it is admitted has been overruled in the case which shortly afterward followed it, 48 Barb. 278. As between mortgagor and mortgagee, a fixture inures to the benefit of the mortgagee where it has been permanently attached to the mortgaged premises. 3 Stockt. 30. Property, including machinery, attached to the freehold passes to the mortgagee after foreclosure. 29 Maine 115; 17 Ser. & Rawle 413; 12 Penna. 304; 19 Penna. 71; 19 Barb. 317; 26 Ala. 493; 15 Penna. 504; 43 Miss. 349; 2 Wall. 491. Real fixtures, such as steam engines, etc., put on the premises by the owner and attached to the freehold as a fixed establishment, are a part of the freehold, subject to real estate liens, and are not liable to be seized as chattels; but not so of trade fixtures set up by tenants for their own use and convenience. *Rice v. Adams et al.*, 4 Harr. 332.

The cases cited warranted him in saying that the engine and iron frame saw-mill with their accompanying machinery sold by the plaintiffs to Holmes, the mortgagor of the premises, were put upon them by him as a permanent addition to and betterment of them in the manufacturing and milling business to which he was about to permanently devote them, and that they thereby became a part of the realty and were incorporated with it in his business establishment, and passed with the premises under the sale of them by the sheriff. The intention with which he purchased such machinery, its adaptability to the purposes of such a permanent manufacturing and milling business, and the mode of laying the foundations of it in the ground, and fixing and fastening it to the earth itself to give it all the solidity and durability practicable and so desirable in such a case, all combined to show conclusively that they thereby lost their previous character as chattels and became part and parcel of the real estate sold by the sheriff.

The evidence in the case disclosed the following undisputed facts: That the engine and its appliances were ordered from Watertown, New York, and were received and placed upon the premises by Holmes at Milford in the latter part of February or the 1st of March, 1873; that he paid on their delivery five hundred dollars in cash to the plaintiffs and gave them three promissory notes for the balance of the price, amounting in the aggregate to one thousand nine hundred and seventy-five dollars, dated March 1st, 1873, payable to their order in four, eight, and twelve months respectively, and that it was not until the 24th day of March, 1873, that the contract for the conditional sale of them was executed by him, and we therefore contend that the sale and delivery of them was complete, absolute and unconditional on the 1st of March in that year, when Holmes on the receipt of them paid the five hundred dollars in cash and gave the three promissory notes for the balance of the price of them, and that the subsequent contract for the conditional sale of them signed by him on the 24th of that month could not change or alter the character of the transaction. Besides, the notes were not paid at maturity, nor were they renewed, although Holmes lived until after their maturity and

died on the 14th of September, 1874; while from that time to the day of the sheriff's sale under the *levari facias* upon the mortgage on the 7th day of April, 1875, no claim or demand whatever was made by or on behalf of the plaintiffs for these fixtures; for it was not until the 31st day of August, 1875, when the attempt was made to sell them upon a writ of *feri facias* at the suit of Grier, that the plaintiffs, through their attorney, Mr. Robinson, either set up any claim to them or protested against any sale of them.

Fisher, for the defendant: The essential requisites and legal criteria of a fixture are, first, it must be placed upon the soil or ground for the purpose of improving or ornamenting it; secondly, it must be intended to be permanent, and thirdly, it must be adapted to the mode of improvement for which it is placed in or upon the ground. Upon the point that the mortgagee has an unquestionable right to the benefit of every permanent improvement or betterment made on the mortgaged premises by the mortgagor, he cited and specially commented on the opinion delivered by *Gibson, C. J.*, in *Voorhis v. Freeman*, 2 W. & S. 117. But if the engine, boiler, and other machinery put on the premises in this case were fixtures the plaintiffs could not maintain an action of trover for them even if they had a right to them as such. The sale and delivery of them by the plaintiffs to Holmes was upon the facts proved a complete, absolute, and unconditional sale, 3 *Dana* 336—because it was perfected before the contract for the conditional sale of them was signed by Holmes. But suppose it had been a conditional sale upon the terms of the special and written contract signed by him afterward, how long could the plaintiffs be allowed to wait after the maturity and non-payment of the notes by Holmes before proceeding to enforce their right by an action at law, and to reclaim and remove them from the premises as against the mortgagee of the premise or a purchaser of them under the mortgage at a sheriff's sale? Could they be permitted to wait for eighteen months until some innocent purchaser, without notice of the conditional sale, or, at least, until some responsible purchaser had thus become the owner of them,

and then bring their action of trover against him and recover the full value of the engine, boiler, and other machinery as property which had all the time been theirs, and not the property of another, to whom they had only sold and delivered them conditionally, and not completely or absolutely? The law could not and would not tolerate such an unreasonable and protracted delay even in such a case.

Ridgely, for the plaintiffs: His colleague had relieved him of the necessity of doing anything more than calling the particular attention of the court to the cases cited on the other side, in all of which without a single exception it would be found that the owner of the freehold was also the admitted owner of the chattel or fixture in dispute in the case. But not one had been produced to controvert or question the soundness of the principle ruled and recognized in several of the cases of high authority cited by his colleague, that possession does not import title although a presumption of title may in general arise from it, and that a conditional sale and delivery of goods, the vendor retaining the legal title to and the paramount right of property in them until the condition is performed pursuant to the terms of the contract of sale, and if not performed by the vendee may reclaim the possession of them from him, is directly and deliberately ruled and established. And the only exception to this rule and principle in England is in the case of goods sold and delivered in market overt. As to the objection taken by the other side on the evidence that the goods were sold and delivered before the contract for the sale and delivery of them was signed by Holmes, that was clearly explained by Grier, who was the agent of the plaintiffs for the sale of their engines in Milford, where he has long resided and is well known, and who as clearly and distinctly testified that his express instructions from his principals, the plaintiffs, always had been never in any case to sell an engine, even on credit for any part of the price of it, without just such a contract for the conditional sale of it as this was, and that Mr. Holmes was well aware that such were his instructions and the extent of his powers as their agent when and before he concluded to order one, and such was their express

understanding and agreement when he ordered the one in question for him, and that he would sign such a contract at the time of receiving it or at any time afterward whenever he should present it to him for his signature, and which had been delayed by himself alone until the day Holmes signed it. Nor could it be supposed by any one that he would have signed it after delivery of it and the giving of the notes if such had not been his previous agreement.

The Court, Comegys, C. J., charged the jury: The Watertown Steam Engine Company, the plaintiffs in the action, was a foreign corporation created by the State of New York, and had its place of business at Watertown in that State, which was the manufacture of stationary engines, iron frame saw-mills, and the necessary fixtures and appurtenances thereunto belonging. In the latter part of the year of 1872 or the early part of 1873, Solomon Holmes, now deceased, but then living in Milford, in this county, entered into a negotiation with George S. Grier, one of the witnesses in this case, and then an agent of the said company in this State, for the purchase of a stationary steam engine and iron frame saw-mill and the machinery and fixtures accompanying them; and it was agreed between them that such an engine and saw-mill should be sold to him by the company on his promising to pay for them the sum of two thousand four hundred and seventy-five dollars as follows: five hundred dollars in cash on delivery and the balance in notes, one of which was to be for five hundred dollars at three months, another for a like sum at six months, and the residue in other notes, the longest period for the payment of which was twelve months. Upon this the mill was ordered, and in the latter part of February, 1873, was received and delivered by the agent to which it was consigned by the plaintiffs, and was erected at once for use upon the real estate of the said Holmes, which was a lot of ground he had purchased in fee simple from the defendant, James B. Davis, by a deed duly executed and delivered and bearing date the 1st day of January, 1873. When the money was paid by Holmes to Grier, the agent, does not appear, but the notes bear date respectively the 1st day of

March, 1873, and before that time the mill was delivered to the former and erected by him upon the Davis lot. About these facts there seems to be no controversy whatever, and they may therefore be taken to be absolutely true. Grier states in his testimony that he forwarded the money and notes to the plaintiffs, who kept the former, but refused to accept the latter unless he, their agent, would indorse them; that he declined to do so as to make himself individually liable for them, but did write his name upon the back of them as agent. The plaintiffs refused to accept them in that form, but in lieu of them required Holmes to sign the writing in proof before you, in which he acknowledges the receipt of the articles, the price to be paid for them, the giving his own notes for the balance (one thousand nine hundred and seventy-five dollars) of the purchase-money, and then consents that in case the notes or any of them are not paid at their maturity the company may enter upon his (Holmes') premises, repossess themselves of the mill, etc., and that he will pay them a reasonable price or sum for such use of them as he has made. This, we think, may be fairly assumed to be true also. We see no reason to doubt the correctness of this part of Grier's testimony, and the writing is before you, is unambiguous in its terms, and speaks for itself. It is also an undisputed fact that the first of the notes was paid when it fell due—thus passing into the plaintiff's hands, with what was at the time of the delivery of the goods paid in cash, one thousand dollars of the purchase price and reducing the indebtedness to the sum of one thousand four hundred and seventy-five dollars with interest added. The other notes matured in due time, the latest on the 1st and 4th of March, 1874, and were none of them paid. On the 18th day of September following, near seven months thereafter, Holmes died, the owner still of the lot purchased from Davis upon which the mill had been erected, and afterward letters of administration upon his estate were granted by the register of Kent County to D. O. K. Strong (Dr. Strong, as he was called), a witness on the part of the plaintiffs. After the grant of administration the administrator hired the mill to parties and collected the rent thereof until he ceased to have any interest in the matter, which was after the sheriff's sale of the

premises now to be spoken of. This sale was made on the 7th day of April, 1875, by Peter L. Cooper, Esq., then sheriff of said county of Kent, by virtue of a writ of *levari facias* in his hands at the suit of the defendant, James B. Davis, from whom Holmes had, as before stated, purchased the lot upon which the mill was erected, the purchase-money being the sum of six hundred dollars, no part of which was ever paid by the latter, but who settled it by his mortgage of the lot to Davis, the defendant; the deed bears date the 1st day of January, 1873, but the mortgage is dated on the 5th. After the death of Holmes, viz.: on the 18th day of September, 1874, Davis proceeded upon his mortgage for foreclosure and sale of the lot sold to Holmes, obtained judgment against the representatives of the latter (the administrator, Dr. Strong, being one of the defendants), and issued the writ of *levari facias*, upon which sale was made as aforesaid on the ensuing 7th of April and was bought by Davis. Afterward in the month of August following, the property in dispute here was sold by virtue of an execution in the hands of Sheriff Williamson at the suit of the said George S. Grier against Holmes and was purchased for a nominal sum by said Grier; but it is an undisputed fact that at this latter sale, four months after the sale of the lot by Davis, the property sold was claimed by the plaintiffs as belonging to them and the sale forbidden, and was also claimed by the defendant under his deed from the sheriff of the lot sold under his mortgage, and the sale forbidden also. There was no attempt by Grier to take away the property bought by him. When the sale was over, or at or about the time it was made, formal demand of the delivery of the property was made of the defendant by an agent of the plaintiffs and delivery was refused and this action of trover was brought for the conversion of it. There can be no mistake about all these facts: they are each and every one of them true, except it may be so far as they depend alone upon the testimony of Grier; and we do not understand that there is any denial of the truth of that part of his testimony above referred to—that is, his communication with the plaintiffs in the treaty of purchase, etc.

From the foregoing statement it results as a consequence that

if the mill in question (and when the term mill alone is mentioned we intend by it not only the saw-mill proper but the engine, boiler, and all the other machinery or apparatus) remained in law the property of the plaintiffs up to the time of the demand of it from Davis (upon whose land therefore, under the circumstances, and in whose custody it was) and his refusal to deliver it up, then the plaintiffs have a clear right of action in the form of trover by them adopted, and are entitled to recover from the defendant by way of damages the value they have proved it to have had at the time of the demand and refusal, with further damages to be added of such sums as shall be equal to the interest on its proved value from the time of the refusal till the rendition of your verdict—provided the aggregate of these sums shall not exceed one thousand seven hundred dollars with interest, which they have announced by their counsel before you to be the limit of their demand. If, on the contrary, you shall be satisfied from the law as we shall announce it to you, and from the facts proved before you, that such property was not owned by the plaintiffs at the time the action was brought, then they are not entitled to recover anything, and your verdict should be simply for the defendant.

We will now proceed, gentlemen, to give you our instructions as to the law which governs this and other like cases, and when you have received them from the court you are to apply it to the facts proved or admitted in the case. And we do not hesitate to say to you, gentlemen of the jury, that we have been very much embarrassed in our minds with respect to the law applicable to this particular controversy, there being two very important points in dispute between the parties, upon one of which, at least, there has never been any statute or judicial decision in this State, and the other has only come up for adjudication upon one occasion. And the embarrassment is the greater because the court is not full—Judge Wootten being absent from sickness in his family—and we have not the benefit of full counsel among ourselves. The duty, however, is upon us to say what we “take the law to be” in this case, and we shall perform it as we best may.

The grounds taken by the learned counsel for the plaintiffs

and which have been presented, as have the opposing views of the defendants' counsel, with ability and fidelity also to their respective clients as well as to the court, are two, chiefly:

First. That the arrangement by which Holmes became possessed of this property was not an absolute sale, but was an executory contract of sale, or at most a conditional sale. Generally in the argument the delivery to Holmes as assumed by the plaintiff's counsel to be a conditional sale, but in the course of it they sometimes seemed to think it advisable to treat the transaction as an executory contract of sale and relied upon that. To our minds they amount to about the same thing, and in this case justify the plaintiffs, as they conceive in denying that any such act was done on their part or in their behalf as clothed Holmes with any title to the property itself, but simply gave him possession, with the right to become the owner on payment of the purchase-money price, the right and title to it in the meantime remaining in the plaintiffs, which no act of Holmes could deprive them of without their consent.

Second. That although this mill was placed by Holmes upon the lot of ground he purchased of Davis, and notwithstanding the fact, if you should believe under our instructions to you as to the law of fixtures, that it was so attached or fastened to the freehold of the premises as to be a fixture, yet, as it was distinguishable from the rest of the real estate without difficulty, and had passed to the possession of Holmes under what they claim as a conditional sale or executory agreement of sale, it never could, without the plaintiff's consent, lose its character of personalty and become real property subject to the defendant Davis' mortgage.

We will take up these several points in their order respectively. And with respect to the first we have to say to you that no decision has ever been made by the courts of this State, either under the old system or that under which we are now proceeding, except perhaps the one in *Sussex*, cited in the third volume of *Houston's Reports* 63, in any respect bearing upon the question of conditional sales or such executory contracts of sale as this is alleged to be by the plaintiffs' counsel. The court is called upon now, for the first time in the history of the State's jurisprudence

to decide the question whether parties can contract with each other for sale of personal property upon secret conditions between them which will govern the title to that property in whose hands soever the same may go, by the act or in consequence of legal proceedings against the vendee of such property, or party with whom the contract of sale may be made, the vendor or contractor being no party to such act of his vendee or contractee nor affected by the legal proceedings against him. In other words, whether in this case the alleged contract between the Watertown Steam Engine Company and Holmes, be it a conditional sale or a contract of sale merely, so impressed itself upon the property in question here as to prevent the latter from making any such disposition of it by the use he applied it to as to subject it to the lien of the mortgage of James B. Davis. Now, treating it, for the sake of the charge we are now making to you or rather the argument of it, as having been so attached to the freehold as to become a part of it (and whether it was or was not so attached is a question for you when we tell you what is necessary to make such attachment), the question presented is this: Did that property thereby become subject to the lien of Davis' mortgage? The settlement of this question by us necessarily involves the other question—whether conditional sales or agreements for sale with delivery of the property are valid in this State as against subsequent purchasers from or creditors of the conditional purchaser or contractee, because if we should declare such to be the law there would still remain the question, which is a vital one in this case, whether James B. Davis, the defendant, is not to have the benefit as mortgagee of the improvements made to the premises sold by him to Holmes, to secure the whole purchase-money for which he took the mortgage upon which the lot of ground with the machinery upon it was sold. We do not understand the learned counsel on the part of the plaintiffs to deny—in fact, we understand them to admit that if there could in fact, in view of the agreement in this case, have been any such attachment of this mill to the premises as would make it a fixture, and this without knowledge at the time by Davis of the nature of the agreement between the company and Holmes, Davis would not be bound by

that agreement and the machinery would be covered by the lien of his mortgage. This we take to be good law, and we charge you that if you find, upon consideration of the testimony in this case, that Davis was ignorant of the contract between the plaintiffs and Holmes, and if we should instruct you that, notwithstanding that contract, that machinery could be made and was made a fixture on Holmes' premises bought of Davis, then this action will entirely fail and the defendant will be entitled to a verdict. But it is insisted by the plaintiff's counsel that Davis did know of such contract and therefore he, as mortgagee and purchaser at the sheriff's sale, is affected by it and cannot resist this action, and also that by the terms of that agreement no title passed to Holmes and he could not make a fixture of the property. We are not prepared to adopt the plaintiffs' view in that respect, but, on the contrary, we say to you, not only upon the authority of what we consider as strong cases cited by the defendant's counsel on that very point, but also upon general principles governing all such questions, that the bare fact of knowledge on the part of Davis, the mortgagee, of the contract between the plaintiffs and Holmes without valid legal agreement on his part, founded upon consideration moving from the plaintiffs to him, cannot affect his right—mere notice in such case, if you believe he had it, and it is denied by the defendant's counsel that he had—having no greater effect than in any other case where a mortgagee actually sees permanent erections being made upon the premises he holds in mortgage. The law is without qualification, that a mortgagee or person holding a mortgage on real estate is entitled to the benefits of all improvements made upon it, and we say to you that he cannot be deprived of that benefit without some binding agreement made by him, and such agreement must have all necessary legal requisites in the case of valid contracts. Mere standing by and not dissenting does not constitute assent, even of an implied character, otherwise every mortgagee would be deprived of the benefit of improvements upon mortgage property which he saw being made. There must, we repeat, be some valid agreement on his part to divest personal property (engine, boiler, mill, and machinery in this case), of its character of real property when it becomes part thereof by attachment to

the reality. We do not decide that such agreement must be in writing (for though the point was suggested by the learned counsel for the defendant who opened this case, he cited to us no authority for it), but we do say that to deprive him of the benefit to his mortgage of the improvement, he must be shown by proof satisfactory to you to have agreed, upon valuable consideration of some sort, that the property when attached should not be bound by his mortgage. And we say to you confidently that if you should be of opinion from the proof that the property about which this suit has been tried before you became, under our instruction as to what is necessary for that purpose, a part of the freehold of Holmes' lot without any valid agreement on Davis' part that it should not be bound by his mortgage, then you should give him a verdict. .

But the question still remains to be disposed of, for it is that mainly relied upon by the plaintiffs' counsel, although they dwelt at great length and with much force upon the subject of fixtures, also what was the effect of the agreement of the 24th of March, 1875? was it a valid paper or not, and if valid what is its operation in the case before you?

Gentlemen, whatever may be thought of the wisdom or propriety of any statute, rule, or principle of law, when ascertained to exist it must be followed until the General Assembly shall think fit in their wisdom to make a different rule. As before stated to you, the subject of conditional sales is almost an entirely new one in the jurisprudence of this State; and although most lawyers, ourselves among the rest, have at times found it necessary to reflect upon the subject, yet but very few of us have been aware, until the great industry, research, and exposition of the learned counsel for the plaintiffs, as evinced in this case, made them acquainted with the authorities, how extensively the question has been considered and how uniformly courts have come to about the same conclusion. The current of authorities is so strong in favor, generally, of the doctrine of conditional sales and their effect that we cannot, if we would, resist its force; and upon reflection, taken in a proper sense, with such proper restrictions as we think should be placed upon it, it is reasonable enough: for otherwise no man would be at all safe

in even placing his property, for whatever purpose, in the possession of another. And the case of the loan of the horse in Sussex, cited from *Houston's Reports* and that of *Sharp & Arthurs*, an unpublished decision in Kent, which you have heard commented upon, both rest upon the ground (for there is no other for them) that the agreement in each case prevented the party, as whose property they were levied upon, from acquiring any ownership in them which could be subjected to creditors' claims. In fact, there is no principle of law better settled than that he who has no title in fact cannot convey any and none can be asserted for him. This is indisputable. Now, while we do not understand the defendant's counsel as at all assenting to the doctrine of conditional sales as contended for to the extent of the views of their opponents, yet they say that even admitting that they are valid generally yet no weight should be given to the agreement of sale in this case (that of the 24th of March, 1873) for two reasons: First, because it is not the agreement on which Holmes acquired the possession of this property by delivery at the hands of the plaintiffs' agent; and second, that if it were, still it is not to govern this case, for their client is not bound by it, he being in no sense a party or assenting to it; and further, that in consequence of the delay of the plaintiffs in asserting their claim under it they should be taken to have waived their rights if they had any. These we understand to be the views insisted on by them, and when we have delivered to you our opinion upon this point and that of fixtures, we shall, we think, have sufficiently answered the prayers on both sides for instructions. As before said, we hold conditional sales fairly made to be valid in this State; and we decide and so instruct you, that in this case if there were nothing appearing to conflict with the effect of the agreement Holmes acquired no property whatever in the machinery, but was a mere depository or bailee with a right secured to him to acquire a title when he paid for it. Such is the fact, although he paid five hundred dollars in cash and gave his note for the balance of the purchase-money, one of which, amounting to a like sum, was paid also. But in this case it is an undisputed fact that Holmes bargained for this machinery with the agent (Grier) of

the Watertown Steam Engine Company some time before the agreement was made, and the delivery to him was in pursuance of that bargain. If that bargain was the sale in fact, completed as it was by the payment of the cash and the giving of the notes, then there is an end to this case, for the delivery vested the title to the property in Holmes. Now, whether it was the sale originally depends upon the extent of Grier's authority, and that we must pass upon. It appears by the testimony of Grier, and also by that of Powers, a member of the corporation plaintiff in this suit, that Grier was the company's agent in Delaware for the sale of their machines, and that as such he made the original bargain with Holmes; being such agent, any act done by him in the course of his employment is the same precisely as if done by any other person acting for the plaintiffs. And the plaintiffs, being a corporation or corporate body, having no physical or mental nature, but existing as a body in contemplation of law only, it must necessarily act by agents. Wherever an agency exists it is presumed to be general, or general about the business with which it is concerned, until the contrary appears, and the public is authorized so to regard it. Applying this principle to the case before you, and Grier must be held to have been a general agent in Delaware for the sale of the plaintiffs' machinery unless the contrary appears, and any bargain or arrangement made between him and Holmes consistent with the character of the transaction of sale and the scope of his agency was binding on the company who appointed him. And whenever a person is held out to the world by another as his agent, either generally or in the line of a business in which he may be engaged, the party so representing him to the world is bound by all his acts within the scope of his authority. *Lattomus v. The Farmers' Mutual Fire Insurance Company*, 3 *Houst. Rep.* 404.

Now in this case, to avoid the effect of the act of Grier, the agent, evidence has been offered to you and given that he had no authority to sell machines for the company other than upon the terms of cash or notes approved by the company, but we instruct you, gentlemen, that such evidence should have no weight with you in deciding this case unless the fact of such limitation

of authority has been shown by proof of some sort satisfactory to your minds, and that Holmes at the time he acquired possession of this property was aware of such limitation. Has any such been offered? That is for you to say—but we have not heard any. There being then undisputed evidence before you (in fact, it was adduced by the plaintiff himself in his examination of his witness, Grier) that there was an agency in him to sell the machines of the plaintiffs—which includes the making of bargains for them such as men usually make in selling such property, and no disclosure having, so far as appears, been made to Holmes of the secret understanding or arrangement between the plaintiffs and Grier that he was only to sell up certain terms—we say to you that in our opinion you are justified in holding the plaintiffs bound by the acts of Grier within the line of his employment, and that line must reasonably be taken to be the same as is usual in the case of sales by others of ponderous and highly valuable articles. And, further, it appears by the proof in the cause, as we think, in fact, it has been virtually admitted by the plaintiffs' counsel all through this cause, that Grier knew the object for which the machinery was purchased—its erection upon the freehold estate of Holmes and attachment thereto so far as that was made for the pursuit of a permanent business or manufacture, and not for a mere temporary purpose. The manner in which it was secured to the premises, if the defendant's witnesses are to be believed, shows, it seems to us, a design of fixed employment. If you find that Grier had such knowledge, then in law the company whose agent he was had the same knowledge and is bound by it. This being the case, then the attachment or fixation of the machinery to the freehold (if under our further instruction you shall find it to have been attached or fixed thereto) was with the consent of said company. In fact, the agreement itself shows that the plaintiffs expected its machinery to be erected upon Holmes' freehold, for it was carefully provided that in case of failure to pay any of the notes there should be a right to enter upon such freehold and take it away; and the company of course knew that such machinery could not be used permanently by Holmes without being fastened to his freehold. It cannot

therefore, as we think, be fairly agured that Holmes affixed this property to the freehold and made it a fixture thereof. If you shall find he so made it without the consent of the plaintiffs, and if you adopt these views as your own, then it will follow that the plaintiffs took the risk of all legal consequences resulting from that act, one of which undoubtedly is that the machinery if a fixture became bound by the lien of Davis' mortgage, unless he agreed in some valid manner that it should not. And it would be no valid answer to this to say that the plaintiffs knew nothing about Davis' mortgage, for it is the law that every one must take notice of liens upon real estate at their peril—the public records being open and notice to every one; nor will it do to say that Davis should have communicated the fact of his mortgage even if he knew of the private or secret agreement between the company and Holmes, for he had nothing to do with that unless he consented to it and in some way waived his lien, and the company is to be held to notice of his mortgage. If the bargain by Grier, being that of their agent, is their bargain, then they knew their property was to go upon this freehold and they ought to have been careful either that it should take on no character of a fixture or that Davis should waive or release his mortgage lien. While we give full force to their contract with Holmes so far as these parties are concerned, or *inter se*, we at the same time say to you under the testimony of the facts proved in this cause, if you believe them, that it held good between them alone, and could not affect Davis, the defendant, unless he assented to it by a valid agreement on his part. And with respect to the alleged restriction upon what must otherwise be admitted to have been a general authority in Grier within the scope of his agency to bargain and sell the plaintiffs' machines, you will recollect that proof of such restriction came not from the agent but from a witness interested as a corporator and large stockholder in the company, and who but for a recent act of the General Assembly of this State could not have been a witness at all.

And now as to the question of fixtures: Did the property in this case ever become fixtures in the eye of the law? It is alleged by the counsel for the plaintiffs that the property in fact

never became fixtures, or a fixture at all, and were therefore never bound by the mortgage of Davis. We have said to you that in our opinion if it became such it was bound by it, unless you believe from the evidence that Davis in some way by a valid agreement consented that it should not be bound by it, but should remain subject to such conditional sale. Well, now, did it become a fixture so as to subject it to liens against the reality in the absence of any agreement on the part of Davis that it should not become so? The law of fixtures in this State came up for decision by this court in the case referred to of *Rice v. Adams et al.*, 4 Harr., 332, the facts of which were Adams was the owner of a lot in Wilmington, on which he had erected prior to the 1st of January, 1845, a foundry, including a steam engine, boilers, cranes, cupola, etc., all fixed to the premises in the usual way, that is, the engine was put up under a shed outside of the main building, the cranes were bedded in the floor and inserted in the main girder of the house, and the cupola was a large brick chimney running from the ground floor up through the roof of the building. This property was levied on by execution process, and the question was, Was it liable to an execution creditor or not? The court treated this machinery as what they call *real fixtures*, placed upon the premises by the owner of the property and by him attached to the freehold, and advertng to the fact that so placed they were not there for a temporary purpose but as a fixed establishment, they decided that they became part of the freehold premises and were not to be treated as personal property. This we understand to be the law in relation to fixtures, such as machinery, as well as other articles fixed by the owner of the land to his inheritance. When these are attached to the land by the owner in a permanent manner, and not for a mere transitory purpose, with such circumstances as indicate a purpose or intention on his part to connect them permanently with the soil or buildings upon it in order to the pursuit of a permanent employment or occupation, they cease to have the character of chattels or movable goods, and become part and parcel of the land, just as much as the doors or window-shutters upon the house are, which, though removable in most cases, by simply lifting them from their hinges, are yet as much part of

the land itself as a tree growing upon it or a rock under its surface. And there is no exception to this except in the case of tenants—in whose behalf the law is so far relaxed, and so far only, as to allow them to affix to the dwelling glasses, curtains, and other matters of mere ornament not requiring in their attachment any injury to the house, and (for the benefit of trade) also such chattels, of whatever kind, as are necessary to enable the tenant to prosecute and carry on his trade or occupation if the premises have been rented by him for the pursuit of such business. In such a case all necessary articles, how securely soever fastened by the tenant to the freehold, may be removed by him provided he exercises the right the law gives him to do so before the term expires—for after that he has no rights upon the land. And we say to you, gentlemen, in this case, that if you believe the witnesses for the defendant that the engine and boiler in this case, or either of them, were set upon and fastened to brick walls built into the soil of this lot, as described by them, requiring for such purpose from eight to ten thousand bricks—which could only have been necessary to make a permanent attachment to the freehold—then all the machinery or articles mentioned in the declaration in this case and proved to have been there by the plaintiffs' witnesses became part and parcel of the freehold, or a fixture or fixtures thereof; for it is not necessary in this case, nor is it necessary in any, as the cases cited by the defendant's counsel abundantly show, that every part of the apparatus necessary to the operation of a mill or works should be fastened to the freehold to make it part of a fixture; but if any substantial part of the complete machinery necessary to carry on the business, as in this case, the steam saw-mill, consisting of the engine, boiler, sawing-post, smoke-stack, gauges, etc., was fastened in a permanent manner to the freehold, then all is to be considered as so attached, and everything also used in working it. And it makes no sort of difference that the engines, etc., may be lifted off the brick work or otherwise, or unscrewed and separated from the building, for now almost everything in the line of machinery may be detached from the freehold without any very serious injury to it. Whatever may have been the law at one period upon that subject it is not strictly followed

now; and in the case of machinery set upon premises by the owner, as in this case, the question rather is, are the things affixed set or erected or fastened to the freehold for a temporary or permanent purpose? and if the purpose is shown to be permanent, as to carry on an employment or business, or if it be an improvement to the property enhancing its value, it should be treated, especially if the adaptation of the means to the end is shown to be appropriate and fit, as being indicative of a design to incorporate the machinery with the freehold and make it part of it, and as such you should regard it. When the attachment of the chattels is thus complete, so that they become part and parcel of the freehold, like the buildings, the fences, and other improvements of a permanent character, the owner of the land himself cannot detach or remove them and change their character back into personalty to the prejudice of a creditor who has a mortgage upon the premises; for to do so, if the value of the lien of the mortgage should be seriously impaired thereby, would be an act of waste, to prevent the commission of which the mortgagee could obtain relief in equity by injunction or by writ out of the Superior Court.

With this view of the law, gentlemen, you will perceive that this case is narrowed down to the question—Was this steam saw-mill, with its engine, boiler, and all the rest that go to make up the whole, a fixture or not, and if so, did they go upon the premises with the consent of the plaintiffs? This is the question, and having instructed you what a fixture is, if you find the proof to come up to the requirements of the law as we have given it to you—that is, that this property was so attached to the freehold as to become a fixture or fixtures, then your verdict in this case should be for the defendant; but if you find the contrary, that is, that it was not so attached, then you should find for the plaintiffs and give them damages to the amount of the value they have proved their property to have had on the day when the demand upon Davis was made, that is, the 13th day of September, 1875, and interest thereon from that date until the time of the rendition of your verdict, provided the aggregate of the sum does not exceed seventeen hundred dollars and interest, which we understand to be the limit of the plaintiffs' claim.

A few words in relation to the evidence in this case upon the disputed fact of knowledge by Davis of the agreement between the plaintiffs and Holmes before and at the time the machinery was set upon the premises of the latter. There are two witnesses who have testified as to the knowledge by Davis of the character of that transaction—George S. Grier and D. O. G. Strong—but Grier alone speaks of Davis' knowledge at the time of the delivery of the machinery and before it was erected on the premises, Strong speaking only of the conversation between himself and Davis after Holmes' death, which occurred near seven months after the last note fell due. We did not understand Grier to speak of any particular fact establishing Davis' knowledge, but he said they had talked upon the subject of the agreement between the company and Holmes often, and he knew Davis must have been acquainted with it, or words to that effect. And he also testified that before Holmes obtained the property, though after the conveyance of the lot by Davis to him, Davis contemplating becoming a joint purchaser but declined to do so; we say this was after the conveyance of the lot by him to Holmes, because he said, as Grier states, that he would be one of them if the machinery went upon Holmes' lot. Now, you will have observed, no doubt, that if Grier's testimony that Davis knew of the terms upon which Holmes was to buy is to be taken as true, then we have the singular result that such knowledge was before any terms whatever were required by the company with respect to the delivery of their property to Holmes. Gentlemen, it cannot be that the time of that delivery, which Grier swears was in the latter part of February or the first of March, Davis had any such notice, for the agreement fixing the terms, and which is the evidence of the existence of them was not sent to Grier to be signed by Holmes until the last of March, that is, the 24th day, and some time after the machinery had been affixed to Holmes' premises. If you understood then as we did the testimony of Grier to assert Davis' knowledge before or at the time the machinery went upon the premises of Holmes, then you must treat it as the result of an error of recollection on his part, just as you must, if you believe the testimony of Benjamin D. Anderson, his

denial that he said in his, Anderson's presence, that one thousand dollars paid to him by Davis would stop his (Grier's) mouth as a witness in this case against him. Anderson is well known to some of you and is positive in his statement. It is for you to say which of them, under the circumstances, you think most entitled to your confidence as a witness—the one without any interest whatever so far as anything appears, and the other having certainly made one mistake (with respect to Davis' knowledge of the agreement between the company and Holmes before any such was made or thought of) and being possibly under the influence of the fact, not adverted to, I believe, by the defendant's counsel, but which, however, it is proper you should be reminded of, that he, himself, became the purchsaer of this machinery as the property of Holmes at the sheriffs' sale made in the fall of 1875. With respect to the testimony of Dr. Strong, it may be sufficient to state that it is confined entirely to a period after he took out letters upon the estate of Holmes and notice of the proceedings by Davis to foreclose his mortgage was given to him, which by the record in evidence here could not have been before the 23d day of October, 1874, quite nineteen months after the machinery was placed upon the premises of Holmes; and the declaration sworn to by Strong as having then been made by Davis that he didn't think the Watertown Steam Engine Company could hold the property and the notes too, if you believe he made such statement, does not necessarily fix him with notice even then, because it does not appear by any proof that the agreement was shown to him, and he might not have known what the real nature of it was. In fact, there is no evidence that the paper in proof here was ever shown to Davis or exhibited by any other party, and it is almost certain that Holmes had no duplicate or copy of it, or his administrator, Strong, would most probably have communicated its provisions to Davis and would have so sworn. We think, therefore, we may fairly say to you that you should consider well the testimony of the plaintiffs' witnesses before you conclude that Davis had notice of the terms upon which the machinery was held by Holmes at the time it became, according to the allegation of the defendant's counsel, a part of Holmes' freehold, and therefor

as they claim, bound by the lien of Davis' mortgage; but if you should upon such consideration believe he had such knowledge then you should give that fact all the weight it is entitled to. But how much weight would it be, in fact, entitled to if fully established in your minds? We know of no rule that would prevent a party holding a mortgage from claiming and being allowed the benefit of any improvements or additions to the freehold upon which his mortgage is a lien, nor of any that requires him to make inquiry to ascertain whether the party making them had the right to do so; on the contrary, the rule as laid down in one of the cases cited in the argument (*Hill v. Sewald*, 53 *Penna. State Reports* 274, citing *Gibbons on Fixtures*, 13 *Law Lib.* 2, p. 4; is that where the owner of the land wrongfully fixes the chattels of another (as materials in a building) it is a conversion of them into the realty, and by the change of their nature leaves the remedy of the owner only in damages. But if the mortgagee in this case, Davis, did no act which can fairly be taken to have amounted to an agreement on his part that the property placed on the premises by Holmes, that is, the steam mill, should not be bound by his mortgage lien although it might be attached to the freehold, we do not see how the fact of his knowledge even (if such were proved) that Holmes held under a conditional agreement can affect him; for to bind him it ought to have been shown that he was a party to the arrangement and was not to take advantage of it against the Watertown Steam Engine Company. No proof of that kind has been made.

To sum up the whole, gentlemen, in a few words, we instruct you as follows as requested by the plaintiffs, but decline to instruct you as further requested by them, for reasons given in this opinion.

First. That conditional sales of personal property are valid in this State; and where delivery of property is made upon agreement that no title shall pass until payment is made or some other thing is done or occurs, no title passes to the party to whom the property is delivered until such payment is made or other thing is done or occurs; and he can pass none to his vendee, no matter how ignorant of the secret contract such vendee may be.

Second. That if such property consists of machinery which is intended to be placed permanently even upon the purchaser's land and is so placed, yet if its identity can afterward be shown to be that of the property bargained for, the conditional vendor on failure of payment can enter upon the premises and remove it and repossess himself of it, provided such be the bargain between the parties, and can recover a reasonable compensation for the use thereof if such also be the bargain.

Third. That if you believe the testimony, Grier was the agent of the plaintiffs in this State to make bargains and sales of their machines; and that such bargains as he might make, if within the general scope of employment in the case of such agencies, were binding on the company.

Fourth. That if any special agency existed by which Grier was restricted to a certain mode of dealing, such restriction is to have no effect in your decision of this case, unless knowledge of it was communicated to Holmes before he erected the machinery upon his freehold.

Fifth. That knowledge of any such special agency, or of the agreement between the company and Holmes of the 24th of March, 1873, cannot affect the lien of Davis' mortgage, which was recorded before the machinery went upon the premises, unless it can be shown that he in some valid mode agreed that it should be exempted from it, or so conducted himself with respect to the matter as to mislead and deceive the plaintiffs into supposing that his lien would not bind the machinery; for in that case he would have been guilty of fraud, of which, when committed by a party, the law will never allow him to take advantage.

Sixth. That if upon the law as we have announced it to you and the facts in evidence, you are of opinion that the plaintiffs ought to recover from Davis, you should give them a verdict for the value they have proved the property to have had at the time of the execution sale when Grier became the purchaser (which is the time of the demand made) and interest thereon till the date of the rendition of your verdict; if you should, however, upon such law and facts, be of opinion that the plaintiffs ought not to recover from Davis, then your verdict should be for the defendant.

JOHN McCafferty v. SARAH A. HERITAGE.

In an action under the statute against a married woman for goods sold and delivered to her while living separate from her husband and not supported by him, an allegation to that effect made by her in her petition filed in court against her husband for a divorce constitutes an admission on her part that may be given in evidence against her to prove that fact on the trial of the case.

The action being on a promissory note purporting to be made and signed by her, but denied by her, her signature to her affidavit of defense filed in the action, being admitted to be genuine, was offered and admitted in evidence in order that the jury might compare the two signatures and determine whether that to the note was or was not genuine also.

Any cohabitation between the husband and wife after the goods have been sold and delivered to her will defeat the action under the statute, and if her promissory note be afterward taken for the price of them it will defeat the action on that also.

ASSUMPSIT on a promissory note for two hundred dollars at six months, dated September 27th, 1872, to the order of the plaintiff by the defendant, who was represented by the counsel for the plaintiff to have been at the date of it a married woman but living separate and apart from her husband, John H. Heritage, and not supported by him. He referred to the statute, *Rev. Code, chap. 83, pp. 478, 479*, which provides that money or other property held or acquired by a married woman living separate from and not supported by her husband, and which has been kept separate from and can be distinguished from the money or property of the husband, shall not be deemed his property or taken for his debts so long as they shall live separate and he shall fail to support her in whole or in part; but such property may be taken for debts and liabilities contracted or incurred by such married woman while so living apart from her husband and for the recovery thereof she may, while her separation continues, be sued as a single woman and may sue in her own name and for her own use for debts contracted and liabilities incurred to her. For her indebtedness and liabilities contracted or incurred while living separate from him without his default he shall not be liable, otherwise he shall be responsible for them to the same extent that he is now responsible by

law. In case they again cohabit he shall be responsible for all her debts and liabilities contracted or incurred during such separation.

Bradford, for the plaintiff, then offered in evidence the petition of the defendant in this court at the May term, 1876, for a divorce from her husband containing her allegation that she was then living apart from her husband and was not supported by him to prove the fact in this case, and cited in support of its competency as evidence for that purpose 1 *Greenl. Ev.* 171, note 1 and *sec.* 195.

Patterson, for the defendant, objected to the admissibility of it.

The Court admitted it.

The plaintiff then produced his book of original entries and his account of goods sold and delivered to the defendant from September, 1871, to January, 1872, for which the promissory note had been given.

James M. Watson was then sworn as a witness and proved the signature of the defendant to the note, after comparing it with her signature to her affidavit of defense filed in this cause and taken before him as a justice of the peace.

The counsel for the plaintiff then offered in evidence the affidavit of defense itself, in order that the jury might compare the defendant's signature to it with her signature to the note, the former being admitted to be genuine, and determine from the comparison whether the latter was genuine or forged. 1 *Greenl. Ev.*, *sec.* 581.

The counsel for the defendant objected to the admissibility of it for that purpose, because the generality of men and of juries were well known to be incompetent to decide such a question by such a criterion. Even the best of experts were often incompetent to detect the difference by such a method between a genuine and forged signature.

Houston, J., suggested that the court had instructed the jury in the case of *Welch v. Coulborn*, 3 *Houst.* 647, that they

might for such a purpose institute a comparison between the signature to a receipt alleged to be forged and the signature to sundry other receipts admitted to be genuine already in evidence before them in the case.

The Court admitted it in evidence.

Patterson moved a nonsuit, when the plaintiff rested his case, on the ground that it appeared by the book of original entries produced in evidence by the plaintiff that all the items of charge contained in his account, and which constituted the consideration for which the note was afterward taken by him, if it was genuine, had been for the sale of intoxicating liquors exclusively; but no proof whatever had been made in this case that the plaintiff had a license to sell such liquor during the time he was selling it to her. He cited *Del. Laws*, 11 vol. 273, 455, 495; 12 vol. 167; 1 *Kent's Com.* 466.

Bradford, in reply, cited, 1 *Greenl. Ev. secs.* 78, 79, 80.

The Court were equally divided on the motion, *Comegys, C. J.* favoring it, and *Houston, H.*, dissenting; *Wooten, J.*, absent. The motion for a nonsuit consequently failed.

The counsel for the defendant then proceeded to call and examine two or three witnesses, one of whom testified that he went there to board, that is, to a hotel in Wilmington at one time kept by the defendant and her husband, in March, 1871, and his wife left when he came back in the fall of that year or the next, but they lived together a little while after he came. Another testified that she went there on the 9th day of January, 1872, and that the defendant and her husband were then living there together and keeping the hotel, but she left him that day and went to Philadelphia, and he remained there, keeping the hotel until the 25th of March following. The third witness, a daughter of theirs, corroborated the testimony of the preceding witnesses, that her mother left the hotel and went to Philadelphia on the 9th day of January, 1872.

Patterson, for the defendant, asked the court to charge the jury on the evidence that if they were satisfied that there was any cohabitation between the defendant and her husband after their separation when he came back to his home at his hotel where she was then living in the fall of 1871, or if there was any cohabitation by them there between the 1st of September in that year and the 1st of January, 1872, during which time the liquor bill was contracted, or that there was any cohabitation between them there after the day last mentioned, no action could be maintained against the defendant by the plaintiff, either on the promissory note or on the original cause of action under the statute even, and consequently their verdict should be for the defendant. And also that the plaintiff having failed to prove, and there being no evidence in the case, that he had a license under the general statutes before referred to to sell intoxicating liquor, he could not recover in the action. *Wheeler v. Russell*, 17 Mass. 257; *Springfield Bank v. Merrick et al.*, 14 Mass. 321; *Bailey v. McDowell*, 1 Harr. 346.

Bradford, for the plaintiff, assented to his first proposition if the evidence would warrant it, and provided their brief abiding together under the same roof could be properly considered a cohabitation within the meaning and policy of the statute. Would a dwelling together for a day or a month or so in the course of a year, followed at the end of it by a separation of equal or longer duration, serve to exempt the wife from her liabilities under the statute in such a case as that? If so, it would be but a delusion and a snare who credited her even with the necessities of life in one of her separations from her husband.

The Court charged the jury in conformity with the prayer of the defendant, provided they were satisfied from the evidence that there had been any cohabitation between her and her husband after the goods had been sold and delivered, for such was the express language of the statute, which was a special and peculiar one in its objects and policy, and applicable only to married women living in a state of separation from their hus-

bands, and the taking of her promissory note afterward for the same could not in that case entitle him to recover in the action, as it would be against the manifest design and object of the statute. They would, therefore, if such should be their conclusion on the evidence, return a verdict for the defendant. But if, on the contrary, they should be satisfied from the evidence that she was living in a state of separation from her husband during the time the liquors were sold and delivered to her, which was from September 1st, 1871, to January 1st, 1872, and had no cohabitation with him after that time, their verdict should be for the plaintiff, and they should assess his damages at two hundred dollars, with interest from six months after the date of the promissory note.

DANIEL W. TAYLOR v. JOB H. JACKSON.

A book or paper produced in court on notice from the other side, under the statute and the order of the court, proves itself without evidence if there be no subscribing witness to it, or if there be and both parties claim or take title or interests under it; but if the party producing it claims or takes no title or interests under it, and there is a subscribing witness to it, he must be called to prove the execution of it, as in other cases.

An action of *indebitatus assumpsit* will lie at the suit of a subscriber to the capital stock of an incorporated manufacturing company, against another who had paid his stock subscription in full, upon the substantial performance by him of a verbal agreement between them that the stock certificate of the former, when made out for him, should be delivered to the latter and held by him as trustee for the company until his subscription for the stock had been paid in full, on his paying in full for the same, notwithstanding they entered into a further agreement, under their hands and seals, that the former would sell and transfer the said certificate and the shares of stock therein mentioned immediately on his ceasing to be an employee of the company to the latter at its par value, and who thereby agreed to buy the same at that rate, and which the latter transferred to the company itself eight days before the former ceased to be an employee of it. But the action would not lie on a part payment of the stock subscription by the former, however large, as it was not a substantial performance of either agreement prevented by the latter; and, besides, it could be of no benefit or advantage to the latter individually, whatever it might have been to the company to which it was paid.

THIS was an action of *assumpsit* on a part performance of a written agreement, signed and sealed by the parties respectively on the back of a certificate for one hundred shares of the capital stock of the Jackson & Sharp Company, as follows: It is hereby agreed between Daniel W. Taylor, the holder of this certificate and the shares of stock therein mentioned, and Job H. Jackson, that in the event of the said Daniel W. Taylor's ceasing to be an employee of the Jackson & Sharp Company from any cause whatever, he or his personal representatives shall immediately sell and transfer the said stock to the said Job H. Jackson, his heirs or assigns, at its par value, and the said Job H. Jackson, for himself, his heirs and assigns, hereby agrees to buy the same at said rate. And in the event of the said Daniel W. Taylor's desiring at any time to sell said stock, it shall be first offered to the said Job H. Jackson, his heirs or assigns, at its par value, and the said Job H. Jackson, his heirs or assigns, shall have the privilege and option of buying it at that rate. Dated October 1st, 1870.

The counsel for the plaintiff offered in evidence the act of the legislature incorporating the Jackson & Sharp Company, showing the corporators of it to be Job H. Jackson, Jacob F. Sharp, and Daniel W. Taylor, and the minutes of the organization of it, when the first named became the president, the second the secretary, and the third the treasurer of it, and also the stock-book of the company to show that the certificate for one hundred shares of stock in it had been issued to the plaintiff; but though one of the stubs in it showed that such a certificate of stock with the name of the plaintiff written on the stub had been severed and detached from it and from the stock-book, there was no receipt of it by the plaintiff indorsed on the stub, as appeared on all the stubs so remaining in it from which the certificates had likewise been severed and detached, each of which had indorsed upon it the receipt of the certificate by the stockholder to whom it had been issued and delivered.

Harrington, for the defendant, on that ground objected that the book was not admissible in evidence to prove the delivery of such a certificate of stock by the company to the plaintiff, for

which purpose he had been notified by the counsel on the other side to produce the stock-book of the company, as it proved no such issue and delivery of it to him, and he alleged that the certificate severed and detached from the book and the stub referred to never had been issued and delivered to him.

Spruance, for the plaintiff: This book is here in obedience to the order of the court under the statute and on notice from our side to produce certain books of the company, and this among them, on the trial of the cause, and it was ruled in a case tried here at the last term that a book so called for from the other side and produced proves itself without any further evidence.

Comegys, C. J.: Where there is no subscribing witness to a paper called for from the other side, or where there is a subscribing witness to it and it appears that both parties claim or take title or a valuable interest in or under it, such is the rule of law and evidence in regard to it. But where the party producing it claims or takes no title or interest under it, and there is a subscribing witness to it, he must be called to prove the execution of it, as in other cases. 1 *Whart. Ev.*, sec. 156. Objection overruled.

Spruance next offered in evidence the written agreement between the parties on the back of the certificate of stock in question, which had also been produced under the notice to the other side.

Harrington objected to its being admitted in evidence until the formal proof of its execution had been made, as it was under the hands and seals of the parties, and was in the presence of a subscribing witness.

Spruance: That is not necessary in this case, as the certificate of stock and the agreement which is written and executed on the back of it has been produced on the other side, pursuant to our notice and in obedience to the order of the court under the statute, which in effect admits it to be genuine and dispenses

with the necessity of any proof on our part of its execution. 2 T. R. 41; 3 Taunt. 60; *Bell v. Chaytor*, 47 E. C. L. Rep. 162; *Bradshaw v. Bennett*, 24 E. C. L. Rep. 205.

Without waiting for the decision of the court on the question, he then offered in evidence the stock transfer book of the company, also produced by the other side under the notice, to prove the transfer of the certificate for the one hundred shares of stock standing in the name of the plaintiff by Job H. Jackson to the company on the 31st day of October, 1873.

Harrington objected to its admissibility in evidence before proof had been made of Job H. Jackson's authority as attorney in fact for the plaintiff to make such transfer of it.

Spruance then called and proved by the subscribing witness to the agreement on the back of the certificate, his signature to it as such witness, and that he saw the parties sign and execute it.

The agreement was then offered and read in evidence. The certificate of stock itself was then offered again in evidence, when *Harrington* again raised his objection to the admissibility of it.

The Court, however, admitted it.

The stock-book of the company was also then again offered in evidence and though again objected to was also admitted, from which it appeared that the first dividend declared on the stock of the company, the capital of which was two hundred thousand dollars divided into two thousand shares of one hundred dollars each, was one of twenty-five per cent. on the par value of the stock in the month of October, 1870, and that the sum of two thousand five hundred dollars out of it was carried to the credit of the plaintiff on the books of the company on his subscription to a hundred shares of stock in it, a resolution or order having been adopted at a meeting of the company, held before that time, that dividends declared by it should be applied to payment of stock subscribed for by the plaintiff until the same should be paid for in full, and it was proved that it was not until the 31st day of December, 1870, that the certificate

of stock in question was made out and severed from the stock-book, and the agreement between the parties was written and executed on the back of it, although they bore date the 1st day of October, 1870, the former being the true date on which certificates were issued to other subscribers and antedated in the same manner. The next dividend was declared in April, 1871 out of which a further credit was entered on the books of the company to the plaintiff's subscription to the stock of it to the amount of his dividend on that occasion of one thousand dollars. The next was declared in April, 1872, out of which a credit was entered on the books of the company to the plaintiff's subscription for stock to the amount of his dividend on that occasion of one thousand five hundred dollars, and the next was in April, 1873, when the further sum of two thousand dollars was in like manner entered to his credit on the books of the company, amounting in all to seven thousand dollars so entered to his credit up to the date last mentioned. Afterward at a meeting of the stockholders, held on the 13th of May, 1873, on a motion seconded by the plaintiff, a resolution was adopted declaring a division of surplus, but that it should be divisible only among such stockholders as had paid in full for their stock, and they might take it in money or in increased shares of stock in the company at their option, and upon which, had the plaintiff's subscription for the hundred shares in question been paid for in full, he would have been entitled to a further dividend of three thousand six hundred and fifty dollars. The balance due upon his subscription with interest added was then four thousand dollars. On the 8th day of November, 1873, the plaintiff ceased to be an employee of the company, the defendant having eight days before that transferred the certificate of stock in question to the company on the books of it. The plaintiff here rested his case.

Harrington submitted a motion for a nonsuit because the plaintiff had failed to prove that he was the lawful owner of the certificate of stock in question when he ceased to be an employee of the company, or that he did not tender it to the defendant then or at any other time, and that being a special

written contract executory in its character up to that time he was bound to prove, but had failed to do so, that he had executed and performed it on his part, or had in part performed it and then prevented from performing it entirely by the defendant; and it being under seal and a special contract proved by him, if it had been in part preformed by him and he had been prevented from performing it fully on his part by the defendant, he should have sued in an action of covenant upon it, and that no action of special or *indebitatus assumpsit* would lie in the case until he had completely performed it on his part. *Rankin v. Darnell*, 11 B. Mon. 30; *Young v. Preston*, 4 Cranch. 239; *Glazebrook v. Woodrow*, 8 T. R. 366; *Hulle v. Heightman*, 2 East. 145; 3 Phil. Ev. 410.

Nields, for the plaintiff: The action was not on the contract itself, but having proved so far a part performance, and a very large and material part performance of it by the plaintiff, and that he was prevented by the defendant from performing it completely, he was entitled to recover for that part performance of it, or, in other words, to recover back the large amount of money paid by him under it in the way of damages in an action of *indebitatus assumpsit*. *Bul. N. P.* 130; *Sickels v. Pattison*, 14 Wend. 257; *Linningsdale v. Livingston*, 10 Johns. 35.

Spruance: The cases cited on the other side were on special contracts for work and labor. The general principle well settled at this day, however, was this: where there has been a part performance of a contract which has been of benefit to the other party, the party partially performing it may recover in this form of action a reasonable compensation for any advantage or benefit derived from it by the other party over and above any loss or damage he may have sustained by the failure of the other party to perform it entirely.

But after the argument on the motion had been concluded the counsel for the plaintiff declined to take a nonsuit.

The counsel for the defendant then proceed with their testimony, when further evidence was elicited as follows: That the plaintiff was one of the directors of the company and seconded

the motion on which the resolution was adopted on the 30th day of October, 1873, that the division of surplus profits declared on that day should be divided among such stockholders only as had paid up in full their subscriptions to the stock of the company, and if he were credited with the amount of that also it would still leave a balance due from him on his subscription to the stock of seven hundred and ninety-two dollars; that the plaintiff had been the treasurer of the company during the whole time before mentioned and referred to at an **annual salary** of two thousand dollars, and that his own account kept on the books of it showed that he was further indebted to the company for over-drafts against it to the amount of six thousand nine hundred and twenty-five dollars and twenty-one cents, and that he had since paid to the company five thousand five hundred dollars, which had been credited by the company to that indebtedness. It was also proved that when the certificate of stock for the one hundred shares was made out for the plaintiff and was detached from the stock-book it was not delivered to him, but by a verbal understanding and arrangement between him and the defendant the latter was to hold it as trustee or agent of the company until the plaintiff's subscription for the stock should be fully paid to the company; and that the certificate of stock never had been delivered to him, but had been retained in the possession of the defendant until he transferred it to the company as before stated.

The case was then argued at length on the evidence before the jury by the counsel for the parties.

*The Court, Comgys, C. J., charged the jury, in substance, after stating that it was an action of *assumpsit* brought by Daniel W. Taylor, the plaintiff, against Job H. Jackson, the defendant, for the performance by him, either in whole or in part, as he alleged, of a written agreement between them dated October 1st, 1870, and signed and sealed by them respectively upon the back of a certificate for one hundred shares of stock in the Jackson & Sharp Company subscribed for by the plaintiff (the original of which was in evidence before the jury), by which he promised the defendant that in the event of his ceasing to be*

an employee of the said company, in whose service he then was, from any cause whatsoever, he, the holder of that certificate and the shares of stock therein mentioned or his personal representative, would immediately sell and transfer the said stock to the defendant, his heirs or assigns, at its par value, and the defendant, for himself, his heirs and assigns, promised him to buy the same at that rate. And in the event of his desiring at any time to sell said stock it should be first offered to the defendant, his heirs or assigns, at its par value, and said defendant, his heirs and assigns, should have the privilege and option of buying the same at that rate. The agreement was between them personally and individually, and the action was against the defendant personally and individually also, to recover damages from him for a complete performance of its stipulations on his part, or if not completely by him, then for a very considerable and costly part performance of it by him upon the ground that he was prevented from performing it entirely by the defendant, as he alleges.

The first five counts in the declaration were special counts in *assumpsit*, the next four were for goods, wares, and merchandise and stock sold and delivered, for stock bargained and sold, and the common money counts in *indebitatus assumpsit*; but on the trial the plaintiff abandoned the first five and rested his case on the last counts only. And then, after observing that the evidence in the case consisted almost exclusively of that which was presented in the books of the company produced by the defendant on the demand of the plaintiff and the order of the court, and which had not been impugned or contradicted by any evidence produced on the other side, he added that there were certain undisputed facts proved in the case to which he would recall the attention of the jury. The Jackson & Sharp Company, now doing business on a large scale in the city of Wilmington as builders of railroad cars, was created a corporation by the legislature of this State on the 24th day of February, 1869, Job H. Jackson, the defendant in this suit, his partner, Jacob F. Sharp, and the plaintiff, Daniel W. Taylor, being the incorporators or persons incorporated by the said act under the above corporate name. The company was duly organized in

pursuance of the act and entered upon the prosecution of its business with a chartered capital of two hundred thousand dollars divided into shares of one hundred dollars each, but with authority given by the charter to the directors of it to increase the capital stock to five hundred thousand dollars on each stockholder being duly notified of the proposed increase by mail or in person, and each to have the privilege of taking their *pro-rata* shares of such issue, which must be accepted within ten days from the date of notice. Stock, however, not fully paid up, or upon which any assessments remained unpaid, not to be entitled to any share of the increase; and one hundred of which shares first above mentioned were subscribed for by the plaintiff in this action, the residue of them being taken by the defendant in it, by the said Jacob F. Sharp, and then or afterward by other persons.

There was nothing paid on the subscription to the stock by the plaintiff at the time it was made by him, and it appeared by the books of the company, which were in evidence before them, that no dividend was declared by it until about the 1st of October, 1870, when one of twenty-five per cent. of the par value of the stock was declared, and the sum of two thousand five hundred dollars was carried to the credit of the plaintiff on the said books, a resolution or order having been previously adopted at a meeting of the company that subscriptions to stock might be paid for by crediting them with the dividends on them.

So far all is certain and undisputed, but now we come to the consideration of the facts which constituted the case before us, and about which there was more or less controversy between the parties. There is no doubt, however, that a certificate for this one hundred shares of stock in the company was made out in the name of the plaintiff in the form of the stock certificates then issued to the other subscribers, and though it bore date on the 1st of October, 1870, yet it has been proved by the uncontradicted testimony of two witnesses for the plaintiff, Mr. Black and Mr. Auchincloss, that it was not in fact made out until the 31st day of December in that year, at which time it was reasonable to presume the certificates were issued and delivered to the other subscribers, for all of the certificates bear the same date, that of

October 1st, 1870. Had the stock certificate for the one hundred shares been delivered to the plaintiff by the company or its agents, the plaintiff would have been the legal owner thereof; but it was further proved by the same witnesses that it was not delivered to him, on the contrary, that by an arrangement between the plaintiff and defendant, and with the consent of the plaintiff, it was delivered to the defendant as trustee or agent of the company, to be retained and held as security for the payment of the balance of the subscription price for the shares of stock stated in it, which was then seven thousand five hundred dollars, and there being no proof to the contrary of what had just been mentioned, the jury were warranted in taking it to be true that the certificate, notwithstanding its date, was in fact made out on the 31st day of December, 1870. On that same day it was also proved by the subscribing witness to it, Mr. Black, before mentioned, that the agreement in writing already more fully and particularly recited, and in evidence before the jury along with the certificate, was entered into between the plaintiff and defendant, by which it was stipulated in substance that whenever the plaintiff ceased to be an employee of the company he should sell and transfer the one hundred shares of stock subscribed for by him, and represented by the said certificate to the defendant at the subscription price of one hundred dollars per share, and by the same instrument the defendant covenanted that he would then buy the stock from him at that price. A little more than two years and eight months after that the plaintiff ceased to be an employee of the company, on the 8th day of November, 1873. Had he then been in possession of the shares of stock subscribed for by him, or rather of the certificate representing them, it would have been in his power to tender himself ready to sell and transfer the said shares of stock therein mentioned to the defendant according to the terms of the agreement, and the latter would then have been bound to accept it and pay the price agreed upon for it, or he would have rendered himself liable to an action of covenant thereon at the suit of the plaintiff for refusing or failing to do so, in which case he would have been entitled to recover damages to the amount of the price agreed upon to be paid for the stock, because the company, by the delivery of the certificate

of stock to him, had it been delivered, would have waived all right or claim to hold the stock represented by it and elected to rely on his personal responsibility solely for the unpaid balance of the subscription price for it. It was, therefore, evident that there was no such delivery of the stock in question to the plaintiff as constituted him the owner of it, so as to enable him to sell and transfer it to the defendant at the time when he ceased to be an employee of the company, if it had not then been paid for in full by him.

It appeared by the books of the company, called for from the other side and put in evidence by the plaintiff, and which furnished the only proof that had been offered in regard to the matter, that at the time when this agreement was entered into between the parties only two thousand five hundred dollars had been paid by the plaintiff on his subscription for the stock, and that by crediting it with his share of the first dividend declared by the company, a balance of seven thousand five hundred dollars (to say nothing of interest) then remained to be paid upon it. During the first part of the trial the action had been prosecuted to recover from the defendant by virtue of the agreement on the special counts in the declaration, upon the ground and claim alleged by him that the defendant had immediately disposed of the stock and certificate by transferring it to the company without the authority or consent of the plaintiff on his ceasing to be an employee of it, and had thereby put it out of the power of the plaintiff, and dispensed with any necessity on his part, to offer or tender a transfer of it to the defendant; but the form of action adopted by the plaintiff precluding him from recovering on the agreement itself, he abandoned his claim in that respect early in the trial and demanded a verdict at your hands on the common *indebitatus* counts contained in it for goods, wares, merchandise, and stock sold and delivered, for stock bargained and sold, and the common money counts; and this latter demand for a verdict is based upon the allegation on his part that the defendant had appropriated to his own use the stock represented by the certificate made out in his name and virtually belonging to him, and therefore he should account to him in this action for the value of it. If the

jury should find upon the evidence before them in the case that the plaintiff was then the owner of the shares of stock in question, and that the defendant appropriated them to his own use, the plaintiff would be entitled to recover the value of them estimated at one hundred dollars per share, with interest thereon from the time of the appropriation, as for so much money had and received by the defendant to and for the use of the plaintiff; but if, on the contrary, they should not be able to find on the evidence before them that the plaintiff had then paid in full for the stock in some manner, by which alone he could then have become the unqualified owner of it, and that the defendant did so appropriate it to his own use, then the plaintiff would not be entitled to recover.

But let us now inquire and consider what is the evidence in the case with reference to the two important points presented in it, that is to say, the plaintiff's payments for the stock and the right claimed by him to possess himself of it, and the appropriation of it by the defendant to his own use as alleged by the plaintiff. And here we must repeat an observation similar to one before made by us that there was no proof whatever in the case, outside of the books of the company put in evidence, that the plaintiff ever made any payment directly or indirectly for the stock, and there was no contention or pretension even that he ever made any payment on it not credited in the said books. And what did they show? That the following payments had been made by way of crediting his subscription with the dividends earned on the shares of stock represented by the certificate in the plaintiff's name and declared from time to time by the company:

1870, October dividend, ...	\$2,500
1871, April dividend, ...	1,000
1872, April dividend, ...	1,500
1873, April dividend, ...	2,000

In all, ... \$7,000

Taking the interest on the stock purchase price into the account and adding it to the price of the one hundred shares of

stock (ten thousand dollars), there was due from the plaintiff to the company on account of his stock when the last of the foregoing dividends was declared and credited to it by the company, per the debit side of the account, the sum of eleven thousand three hundred and thirteen dollars and forty cents, which was subject to a deduction of seven thousand dollars for dividends credited, and thus leaving a balance to be paid in some manner before the subscription price of the stock could be discharged of four thousand three hundred and thirteen dollars and forty cents. To entitle the plaintiff to have a delivery to him of the stock certificate in question so as to be able to offer or tender a transfer of it to the defendant pursuant to the terms of the agreement on his part, he was bound to show by proof satisfactory to the jury positive in its character, and not by conjecture, inference, or presumption merely, how to get rid of that balance against him. Had he done it? That was one of the questions on which the right of the plaintiff to recover depended. It was not pretended by his counsel that he had done so other than in one of two ways—first, by reason of a certain division or distribution of surplus earnings of the company, as they were denominated, amounting in the aggregate to seventy-three thousand three hundred and seventy dollars, among the stockholders, made by the directors on the 30th day of October, 1873, the plaintiff's share of which they contended was three thousand six hundred and sixty-eight dollars and fifty cents, and secondly, by his share of other profits or gains which they assumed in the absence of any proof whatever as to that particular matter accrued to the company between the 31st day of March preceding and that date, and which share they estimated by conjecture merely to have amounted to one thousand dollars distributable to him on account of his stock. But with respect to the first he had to remind the jury that it was in evidence before them and not controverted that by a resolution adopted by the stockholders of the company at a meeting held on the 13th day of May, 1873, which the plaintiff attended and where he seconded the motion for its adoption, it was determined in substance that a dividend of twenty per cent. of the par value of the stock of the company should

be declared, and which should be payable to all the stock, but as to the residue or surplus of gains or earnings, they adopted the recommendation of the president of the company in his report submitted to the meeting, that it should be divisible among those members or shareholders only whose stock had been paid for in full, and they might take it in money or in increased shares of stock at their election. It was adopted with the marked approbation and consent of the plaintiff, and whether that was necessary or not to bind and conclude him in regard to the matter, if he then had not paid in full for his stock, he neither then nor at any time afterward could claim any benefit whatever from that residue or surplus either as a further payment or credit on his stock or otherwise if he had not paid for it in full at that time. As to the second way or source of payment suggested by the counsel, he had again to remind the jury that there was no proof whatever before them that any other dividend was declared or made of profits of any sort by the company from the date of the surplus division before mentioned up to the time when the plaintiff ceased to be an employee of it. Nor had they before them any evidence that the company had declared any dividends since that time; and in the absence of all such proof the plaintiff could have no right to claim any credit on his stock account on either of the grounds suggested by his counsel and which he had just stated.

But to return to the original question, has the plaintiff shown by the evidence in the case, and upon the facts proved and uncontradicted to which he had already referred, that he was entitled to the possession of the certificate of stock in question by reason of having paid for it when he ceased to be an employee of the company? The jury must so find, or he could not recover against Job H. Jackson, the defendant, whatever remedy, if any, he might have against others, of which it did not become his duty then to speak. He had stated all that had been suggested on behalf of the plaintiff, except the payment made by him to the company of the sum of five thousand five hundred dollars, which was applied by the company to make good his overdrafts while he was treasurer of it, of which the evidence was also be-

fore them and not contradicted, and which it had a right to so apply under the facts and circumstances proved in the case.

But the plaintiff, by his counsel, had further contended that whether his stock subscription for the one hundred shares had been fully paid for or not by his dividends, he was still entitled to recover, because the defendant, as he alleged, had appropriated the same to his use by his transfer of it to the company without his authority and consent, which was proved and not denied on the other side, and that the defendant had thus become bound in law to account to him under one or the other of the counts in the declaration for goods sold and delivered, for goods bargained and sold, or for money had and received by him to and for the use of the plaintiff, for the value of it at the time of the appropriation, on the ground that he had thereby prevented him from paying in full for it, after having paid such large amount upon it, and also from selling and transferring the stock to him at its par value as soon as he ceased to be an employee of the company, pursuant to the stipulations of the agreement on his part, and that such value of it in case of his recovery on either of these counts was to be ascertained and established by whatever amount of money the jury might find to have been paid in any manner, directly or indirectly, by the plaintiff on his subscription for the one hundred shares of stock up to the time when he ceased to be an employee of the company, or, in other words, that if they should find that he had not paid in full for it, then under the facts and circumstances stated, and not disputed, and on the common *indebitatus assumpsit* counts referred to, he would be entitled to recover for his part performance of the agreement in paying such a large amount of money on his subscription for the stock while the agreement was yet existing and executory between them, with the intention of paying in full for it and completely performing the agreement on his part pursuant to the terms of it by the sale and transfer of it to the defendant whenever he should be willing to accept the stipulated price, or whenever he should cease for any cause whatever to be an employee of the company, and that the proper measure of the damages in the case of such a recovery would be the aggregate amount which the jury might find that he had

paid on the stock from time to time, either directly or indirectly, though less than the full amount to be paid on it, with interest thereon from the time when the defendant by the wrongful act before mentioned put it out of his power to perform the agreement entirely on his part, according to the strict and literal terms of it.

But the evidence in the case was that by an arrangement and understanding between the parties and with the express consent of the plaintiff, the certificate of stock when it was made out was delivered to the defendant as the trustee or agent of the company, to be held and retained by him for its security until the stock represented by it should be paid for in full by the plaintiff, there then having been but two thousand five hundred dollars paid on the subscription price of it, which was ten thousand dollars, and it was then the agreement in question was entered into between them and was written and executed on the back of it. There was no proof in the case that the plaintiff ever offered at any time, either before or after he ceased to be an employee of the company, to sell and transfer the stock represented by it to the defendant at the price stipulated in the agreement or at any other price, and if it was not paid for in full when he afterward ceased to be an employee of the company, then there was no evidence in the case to support the count for goods sold and delivered by the plaintiff to the defendant, or the count for goods bargained and sold by the plaintiff to the defendant, for the stock had not yet been sold and delivered, or even been bargained and sold by the former to the latter, for it was at most but a bargain to sell at a future day without being perfected by a sale afterward. And as by the arrangement and understanding between them, the defendant, who was then the president of the company to whom the stock certificate was then delivered as its trustee or agent, to be retained by him for its security until the stock should afterward be paid for in full by the plaintiff, if it was not paid for in full when he ceased to be an employee of it, then the transfer of the certificate and the stock represented by it by the defendant to the company, as the trustee or agent of it under the arrangement and understanding between the parties by which he thus became

the holder or bailee of it, could not constitute in contemplation of law an appropriation of the certificate or the stock represented by it to his own use, nor a sale of it by him to the company, for he received no money or other valuable consideration for the transfer of it to the company, and as he neither appropriated it to his own use by so transferring it, nor received any money for such transfer of it, there was no evidence in the case to support the remaining *indebitatus assumpsit* count in the declaration for money had and received by the defendant to and for the use of the plaintiff; and therefore, without any evidence before the jury to support them, the plaintiff could not recover on either of the three last counts referred to in the declaration.

It was also contended by the counsel for the plaintiff that by the transfer of the stock to the company the defendant had put it out of his power to make or tender a transfer of it to him, and had thereby prevented him from performing the agreement entirely on his part, but the truth and validity of that statement depended upon the same question before suggested, and the all-important question to be determined by the jury in the case upon the evidence before them, and that was, had the plaintiff complied with his arrangement and understanding with the defendant, who was to hold the certificate of stock as the trustee or agent of the company until it had been paid for in full by the plaintiff by having paid for it in full by the time he ceased to be an employe of it? If he had not, then he was precluded by it from claiming or demanding the possession of the certificate of stock from the defendant or from claiming the right to sell and transfer it to the defendant or to any other person. Something was also said by the learned counsel for the plaintiff about his having been a director and recognized by the other directors and by all the members of the corporation as a stockholder in the company from the time of its organization until he ceased to be an employee of it, but how far that recognition might conclude the company and prevent it from questioning whether he was so or not in law or in fact, it could not affect this case, because it was not a suit by him against the company to recover compensation from it for any loss or injury or injustice he might have sustained at the hands of the company

itself by reason of anything done by it or by its board of directors in relation to the matter out of which the suit had arisen, but it was an action brought by the plaintiff against the defendant personally, as he had before remarked, to recover damages for the alleged breach of an agreement between them individually, the nature and terms of which were by that time well known to the jury, and to which neither the company nor any other person was a party or could be, as the agreement was wholly between the plaintiff and defendant as individuals, and none but themselves were bound by it or could commit a breach of it on either side; and the fact that the defendant was the president of the company when the agreement was entered into between them and when the breach of it occurred, on his part, as alleged by the plaintiff, could not change or affect the character of it in the least in that respect. It was not, however, an action of covenant founded directly on the written agreement executed under their hands and seals, but an action of *assumpsit* which the counsel for the plaintiff contended would lie at the suit of the plaintiff against the defendant under the facts and circumstances proved in the case, notwithstanding the agreement was in writing and under seal, provided the jury should be satisfied from the evidence that the plaintiff had in any manner, either directly or indirectly, paid the company in full for the hundred shares of stock subscribed for by him, or that he had been prevented from paying for it in full, after having paid seven thousand five hundred dollars on it (which was admitted), by the act of the defendant done without his authority or consent, and that he had thus been prevented in either case by the defendant from completely performing the written agreement between them pursuant to all the stipulations of it on his part, by either failing to offer to sell and transfer the stock to him at its par value, in case the jury should be satisfied from the evidence that he had paid for it in full when he ceased to be an employee of the company, or if he had not, that he still had been prevented from doing so and from making the like offer to sell and transfer the certificate of stock to him at its par value when he ceased to be an employee of the company, by the act of the defendant in transferring the certificate of stock to the company without his authority or consent;

•

and in the event that the jury should be so satisfied in either aspect of the case as they had it thus presented to them, the plaintiff would be entitled to recover against the defendant in this action such damages as they might consider just and reasonable under all the facts and circumstances proved, because of his bad faith and the virtual breach of the agreement on his part by so doing.

Should you be of opinion that the plaintiff is entitled to recover on either of the grounds last stated, the measure of his damages should not be less than the amount which they should find had been paid by him in the aggregate from time to time to the company on his stock subscription, with interest thereon from the date of such payment added to it. And as it was not an action of covenant founded directly on the written agreement itself, but an action of *assumpsit* of the scope and character which he had just described according to the contention of the counsel for the plaintiff, it was, of course, conceded by them, by implication at least if not expressly, that the cause of action in the cause consisted of the alleged breach of the two separate and distinct agreements entered into between the parties on the same day, the first being a parol or verbal agreement merely, by which the plaintiff consented in substance that the certificate made out in his name for the hundred shares of stock subscribed for by him should be delivered to the defendant to be held and retained by him as the trustee or agent of the company until the plaintiff had paid in full for his subscription for the stock as security for the full payment of the same by the plaintiff to the company; and the second being the agreement between them in writing under their hands and seals, and written and executed by them on the back of the stock certificate for the said stock so delivered to and retained in the hands of the defendant under and by virtue of the said first mentioned and parol agreement, the second or latter under seal, executed the same day, containing the agreement between them that in the event of the plaintiff's ceasing to be an employee of the company from any cause whatever that he should immediately sell and transfer the said stock to the defendant at its par value, and that the defendant would buy the same at the said rate;

■

and in the event of the plaintiff's desiring at any time to sell said stock it should be first offered to the defendant at its par value, and he should have the privilege and option of buying it at that rate. For the only ground on which the counsel for the plaintiff have presented his right to recover in the action is based on his alternative claim for damages before mentioned, each of which was incidentally or indirectly founded on the two agreement between the parties, joined together and substantially treated and considered as one agreement by them for the purposes of the suit as contended for by them, and it had been defended on the same ground by the counsel for the defendant through the trial of the case; the action, however, was not founded directly or exclusively on either agreement in the plaintiff's alternative claim for damages on the ground that he had completely performed either of them in accordance with the strict and literal terms and stipulations of either of them on his part, but on the ground that if he had paid in full for the stock on the first agreement, he had been prevented by the defendant from selling and transferring it to him under the second agreement in the manner before stated when he ceased to be an employee of the company, or if, after having paid a very large portion of the price of it to the company, he was prevented by the plaintiff from paying the balance of it to the company and selling and transferring the stock to him at that time as before mentioned, he was entitled in either of those alternate events to maintain the action against the defendant and to recover damages to the amount before specified by him.

If he had succeeded in proving to the satisfaction of the jury by the evidence in the case that he had paid the company in full for the stock when he ceased to be an employee of it, then the defendant was not warranted or justified by the agreements between them in transferring the certificate and shares of stock mentioned in it to the company without his consent and without giving him a reasonable time to offer to sell and transfer the same to him at its par value, although the stipulation of the agreement was that he was to sell and convey it to him at that price immediately on the occurrence, for such a substantial performance of the agreement by the plaintiff of having paid the

company in full for the stock by that time justly entitled him in this action, which in that respect was founded on the facts and circumstances, and to a certain extent on the equity and justice of the case, to reasonable time for selling and transferring, or for offering to sell and transfer it to the defendant at that price before the plaintiff could have any right to transfer it to the company immediately on that occurrence, or without giving him reasonable time to do so and without his knowledge and consent. Besides, by the first agreement by which the certificate and stock mentioned in it were with his consent delivered to the defendant to be held by him for the purpose stated until the stock should be paid for by the plaintiff, it was imported, of course, that they were to be delivered to him by the defendant as soon as that had been done, and if the plaintiff had not then sold and transferred the stock to him according to the second agreement he would have been liable to him in an action for refusing to do it. And, therefore, if such should be the finding of the jury after carefully considering all the evidence in the case, their verdict should be for the plaintiff, and the measure of his damages should be the full price, which was the par value of the one hundred shares of stock paid for by him in the company with interest upon it from the time it was paid in full by him. But if you should find that it had not been paid in full by him to the company, then the case stood on a different ground so far as the defendant was concerned, for in that case the plaintiff had not substantially complied with either of his agreements with him, even though they should find a large balance to his credit on the books of the company, after properly considering and weighing everything in evidence for and against him according to the instructions already given them on the subject, because no part performance of such an agreement as a partial payment, however large, of his entire subscription price could be of any benefit or advantage to the defendant individually, whatever it might have been to the company, and therefore in that case their verdict should be for the defendant. The defendant had a verdict.

COURT OF ERRORS AND APPEALS.

JUNE TERM.

1877.

MARGARET B. BUSH, respondent below, appellant, v. WILLIAM BUSH ET AL., petitioners below, appellees.

To entitle a widow to dower in intestate lands of her husband, he must have had during their marriage title or right, legal or equitable, thereto in fee simple.

If his title or right to such intestate lands constituted a legal estate of inheritance in fee simple in them, then he must also have been seized of them in law or in fact some time at least during their marriage to entitle her to dower. He must, during the time mentioned, have been seized of a legal estate of freehold in possession with a like estate of immediate inheritance in fee simple in remainder or reversion; the freehold and inheritance must be consolidated and have been in the husband *simul et semel* some time, at least, during their marriage to entitle her to dower in them. Nor is she dowable in contingent or executory legal estates of inheritance in fee simple as to which the husband dies intestate. Therefore, in a devise of lands and tenements to a trustee in trust for another during her life, and at her death to her lawful issue in fee simple, if she should leave any to survive her, but if not, then to her two brothers, their heirs and assigns, forever. One of the brothers died intestate in the lifetime of the *cesqui que trust*, and she died without issue surviving her, it was held that it was a devise of the legal estate to him in one undivided half part of them in contingent remainder in fee simple, expectant and dependent on the uncertain and dubious determination of the legal estate devised to the trustee for the life of the *cestui que trust*, and her death without issue surviving her, and as he died before her he was never seized in law or fact, or entitled to the possession of them, and for which his widow who survived the *cestui que trust* was not entitled to dower in the moiety of them so devised to him in fee simple.

It was not a devise to him, however, of any equitable right or title to the lands and tenements in question, much less of an equitable estate therein in fee simple. No one named or contingently provided for in the devise could

have taken any equitable right or title to or any equitable estate in them by virtue of the devise, except the *cestui que trust*, and she took an equitable estate but for the term of her life only in them.

THIS was an appeal from a decree in the Court of Chancery in and for New Castle County, on a petition for partition of certain real estate devised in the last will and testament of Samuel Bush, deceased, to his son, George Bush, also since deceased intestate, at the suit of the appellant, Margaret B. Bush, his widow, who claimed as such a right of dower therein under a devise to him by his father, from so much of the decree of the chancellor in the partition as disallowed her claim of dower in the real estate so devised to him.

The devise in the will of Samuel Bush, to his son George Bush, her husband, was as follows:

"ITEM.—I give, devise, and bequeath unto my son, David Bush, his executors and administrators, the following real and personal property, to be held by him and them in trust during the natural life of my beloved daughter, Rebecca, the wife of Frederick Leonard, Esq., to wit: My house and lot on the southerly side of Hanover Street, between Walnut and Poplar Streets, be the contents thereof more or less, with the improvements and appurtenances, in the borough of Wilmington aforesaid; my house and lot on the westwardly side of Shipley Street, between Front and Second Streets, in the said borough, be the contents thereof more or less, with the improvements and appurtenances; my house and lot in the said borough on the west side of Orange Street, between Front and Second Streets, adjoining lands of George Griffin, Peter Johnson, and others, be the contents thereof more or less, with the improvements and appurtenances; my lot of ground in said borough, bounded by Shipley and Water Streets, property late of Enoch Moore, and the Christiana Creek, with the improvements and appurtenances; and also my lot of marsh in Holland's Creek Marsh, in the hundred of New Castle and county aforesaid, be the contents thereof more or less, with the improvements and appurtenances; also thirty shares of Wilmington and Kennett Turnpike stock, and also the sum of one thousand dollars to be paid by my son,

George Bush, out of my plantation hereinbefore devised to him, subject to the payment thereof, and it is my mind and will that the said trustee, his executors and administrators, after deducting thereout the necessary moneys for repairs and taxes, pay over regularly and half-yearly for the sole and separate use of my said daughter, Rebecca Leonard, during her natural life as a *femme sole*., without any control or direction whatever of or by her said husband, Frederick Leonard, or the creditors of the said Frederick Leonard, the rents, interest, issues, profits, and incomes of the said real and personal estates so devised and bequeathed in trust as aforesaid, and that my said daughter Rebecca's receipts, signed by her, shall be full discharges therefor. And I do give, devise, and bequeath unto the lawful issue of my said daughter Rebecca, that shall be living at her decease, all the said real and personal estate so given, devised, and bequeathed as aforesaid in trust for the separate benefit of her, my said daughter Rebecca, during her natural life, the real estate in fee simple and principal of personal absolutely; but if my said daughter Rebecca shall die without issue to survive her, then and in such case it is my will that all said real and personal estates so devised and bequeathed for the sole benefit of my said daughter Rebecca during her natural life shall go to my two sons, David Bush and George Bush, and upon such event I do give, devise, and bequeath the same to them, my said two sons, David and George, their heirs and assigns forever."

And the codicil thereto, bearing date June 25th, 1830, which is as follows, viz.:

"ITEM.—And further, it is my will and desire that if my son George Bush shall die without issue, arriving at the age of twenty-one years, that then in such case do I hereby give, bequeath and devise the estate given, bequeathed, and devised to him in my said last will and testament, to the children of my son David Bush, and to their heirs and assigns forever, subject to the right of dower of the wife of my said son George Bush.

"And lastly, it is my desire, that this, my present codicil, be annexed to and made a part of my last will and testament to all intents and purposes."

The facts of the case will appear from the opinion of the chancellor, delivered in the court below as follows:

George Bush, one of the devisees named in the will, survived the testator for some years and died, leaving to survive him a widow, the said Margaret Bush, and several children as his heirs-at-law, who, or the heirs of whom, are parties to this proceeding. Rebecca Leonard, the daughter of the testator, survived both the testator and the said George Bush many years, but has very recently died, leaving no issue to survive her. George Bush never was in possession and was never entitled to the possession during his lifetime, of any of the lands which, are the subject of these proceedings. Margaret Bush, his widow claims dower in the undivided interest or share of the estate above devised, which would have passed, by the terms of the devise, to her husband, had he survived Rebecca Leonard. Her claim is based specially upon the supposed peculiar words of our act of assembly entitled, "Intestates, Real Estate," section 1 of which provides that "when any person having *title* or *right*, legal or equitable, to any lands, tenements, or hereditaments in *fee simple*, shall die intestate as to the same, such lands, tenements, or hereditaments shall descend and pass in fee simple to his kindred in co-parency, according to the course or order therein mentioned." Among the provisions of said section, is this: "If the intestate leave a widow, and also any child, or lawful issue of such child, said widow shall have one-third part of the real estate aforesaid for the term of her life as tenant in dower, etc." Dower, at common law, exists where a man is seized of an estate of inheritance and dies in the lifetime of his wife. In that case she is, at common law, entitled to be endowed for her natural life of the third part of all the lands whereof her husband was seized, either in deed or in law, *at any time during the coverture*, and of which any issue which she might have had might, by possibility, have been heir. To the consummation of the title to dower three things are, accordingly, requisite—marriage, seizin of the husband, and his death. It is necessary that the husband shall be seized at the time of marriage or during coverture, either in fact or in law. The husband must be seized of a freehold in possession, and of an estate of immediate inherit-

ance in remainder or reversion, to create a title to dower. The freehold and the inheritance must be consolidated and be in the husband *simul et semel* during the marriage to render the wife dowable.

If a freehold in a third person intervenes between the husband's freehold for life and the inheritance limited to him after the determination of such intervening freehold, and such intervening freehold does not determine during the coverture, the widow will not be entitled to dower.

If the testator, Samuel Bush, had devised these premises to his son, George Bush, for life, remainder to his son, David Bush, in trust, for his daughter, Rebecca Leonard, during her natural life, but in case the said Rebecca should die without issue to survive her, then to the said George in fee, and George had afterward died, leaving Rebecca to survive him, and she had subsequently died without issue to survive her, George's heirs-at-law would have taken the estate, but his widow would not have been entitled to dower therein, for the reason that George never, at any time during the coverture, had a fee simple in the lands, and never had title or right, legal or equitable, thereto in fee simple. In such case he would have had a legal title and right to the freehold, but not to the immediate inheritance; and, upon the death of Rebecca, without leaving issue to survive her, his heirs would have been entitled to the inheritance under the terms of the will, but his widow would not have been entitled to dower because at no time during coverture would the freehold and the inheritance have been consolidated and been in him *simul et semel*.

George Bush, the deceased husband, never had any freehold estate in the lands mentioned in these proceedings. That was outstanding in a trustee for the benefit of a *cestui que trust*, who survived George Bush many years. He never, during his lifetime, had any present interest in them, and neither he nor his heirs could, by virtue of any devise contained in the will of Samuel Bush, ever have any future interest therein except upon the contingency of Rebecca Leonard's dying without issue to survive her. Neither the freehold nor the inheritance of these lands, under the terms of Samuel Bush's will, was ever in

George Bush, the husband in his lifetime, only a possibility of becoming entitled to one-half of both by the death of Rebecca without issue to survive her before his own death, which did not occur. Upon her death afterwards without leaving issue the lands passed in common to the heirs-at-law of the said George Bush and to David Bush by the express terms of the will of Samuel Bush, the testator.

Under our intestate law, to entitle the widow to dower, the husband must have had title or right, legal or equitable, to lands, tenements, or hereditaments in *fee simple*. What is a *fee simple* in lands, tenements, or hereditaments? It is (says Blackstone) "the highest and largest estate that is capable of being enjoyed." "He that is tenant in fee hath in him the *whole* of the estate." In illustration of the doctrine of remainders he says: "If a man seized in fee simple granteth lands to A for twenty years, and after the determination of the said term, then to B and his heirs forever, here A is tenant for years, remainder to B in fee. In the first place, an estate for years is created or carved out of the fee and given to A, and the residue or remainder of it is given to B. But both these interests are, in fact, only one estate, the present term of years and the remainder afterward when added together, being equal only to one estate in fee. They, are, indeed, different parts, but they constitute only one *whole*; they are carved out of one and the same inheritance; they are both created, and they both subsist together, the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of said term to B for life, and after the determination of B's estate for life, it be limited to C and his heirs forever, this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions; there is, first, A's estate for years, carved out of it, and after that B's estate for life, and then the whole that remains is limited to C and his heirs.

"And here, also, the first estate, and both the remainders for life and in fee, are one estate only, being nothing but parts or portions of one entire inheritance, and if there were a hundred remainders it would still be the same thing, upon a principle

grounded in mathematical truth, that all the parts are equal and no more than equal to the whole."

"Again," he says, "a particular estate, with all the remainders expectant thereon, is only one fee simple, as forty pounds is part of one hundred pounds, and sixty pounds is the remainder of it; wherefore after a fee simply once vested there can no more be a remainder limited thereon than after the whole hundred pounds is appropriated there can be any residue subsisting."

The testator, Samuel Bush, devised the real estate mentioned in these proceedings to David Bush, his executors and administrators, for his daughter, Rebecca Leonard, in trust during her natural life. This was a devise of the property for life. He then devised the property after the death of his daughter to such of her issue as might be living at her death in fee simple. He thus disposes, for the present, of his whole estate in the premises; the freehold to David Bush in trust for Rebecca Leonard, and the remainder in fee; the freehold and remainder though being separate parts of, yet constituting together the whole estate, or the fee simple thereof. The testator, however, provides for a possible contingency, that of there being no issue of his daughter living at the time of her death, and in that event, and only upon the happening of that contingency, he devises the said real estate to his two sons, David Bush and George Bush, their heirs and assigns, forever.

Such a contingent or executory interest has none of the distinguishing qualities of a title or right in fee simple. It is what is denominated a possibility; and, although all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent and devisible and assignable, it has never been held that any such interest constitutes title and right to land in fee simple. When the contingent estate of inheritance becomes a vested estate in fee simple in possession, the right to dower, then and then only, becomes possible. Before the contingent interest or possibility in this case, under the will of Samuel Bush, became vested in possession, George Bush died. It could not so vest in him but vested in

his heirs, free from any claim or right to dower by his widow therein.

The act relating to intestates' real estate has been on the statute book for forty-nine years, during which time it has never received the construction now sought to be given to it. The design of the act, so far as it relates to right of dower, was to remedy what was by many, if not generally, considered an unjust discrimination in favor of the husband by allowing a right to courtesy in equitable estates, and against the wife by denying a right to dower in such estates. The act, therefore, gave a right to dower to the wife in every species of estates in which the husband might be entitled to an estate by the courtesy. It was not designed by passing that act, and such is not the legal effect of the act, to destroy any of the previous requisites to an estate in dower, except that which confined it to a legal estate. For these reasons I decide that Margaret Bush, widow of George Bush, is not entitled to any right of dower in the real estate subject to partition in these proceedings, nor to interest on any of the money which may arise from a sale of the same under a decree in this cause.

Patterson for the appellant, after reading the petition, the decree of the chancellor, his opinion in the court below, and the provision in regard to dower in the real estate of intestates: *Rev. Code, chap. 85, sec. 1, par. 6, p. 515; Digest of 1829, p. 316*: "When any person having title or right, legal or equitable, to any lands, tenements, or hereditaments in fee simple shall die intestate as to the same, such lands, tenements, or hereditaments shall descend in fee simple to his kindred in coparcenary, according to the following course or order, to wit:" then, after prescribing in the next five paragraphs the canons of descent under it, the sixth paragraph on the subject of dower in such intestates' estates prescribes as follows: "If the intestate leave a widow, and also any child or lawful issue of such child, said widow shall have one-third part of the real estate aforesaid for the term of her life as tenant in dower; or if there be no child of the intestate nor lawful issue of such child, the said widow shall have one moiety or equal half part of the real estate aforesaid to hold to her for the term of her life after the manner

of tenant in dower; or if there be no kin or heir of the intestate, the said widow shall hold all of the real estate aforesaid for the term of her life," said that the chancellor, it would be observed, had taken the ground in the opinion delivered by him in the court below that it was the intention of the legislature by the provisions of the statute just read to abolish the invidious distinction which existed at common law between a tenant by the courtesy and a tenant in dower in reference to an equitable estate in lands. But was not that an unwarrantable assumption? There were three things the law favored, "life, liberty, and dower," and that was a well-established precept and maxim of the common law long before the statute was enacted.

The chancellor's reasoning to the middle of the sixth page of the printed copy of his opinion was predicated on the common-law doctrine of "seizin" in the husband during the marriage and in his lifetime to entitle his widow to dower, but which was not only superseded in fact but intentionally so, by the provisions of the statute just read in case of an equitable title or right to real estate in contradistinction to a legal title or right to the same, as the trustee, and not the *cestui que trust*, is always seized of the legal estate in contemplation of law. The statute cut up by the roots the old common-law requisites of legal estate and seizin in reference to the allowance of dower out of intestates' estates when the right and title of the intestate husband to them was equitable instead of legal. The law, as distinguished from equity, recognized rights as such, and as distinct from things, such as rights to things, and in regard to real estate as distinct from the body of the estate itself and from seizin. That principle was recognized in the Court of Errors in the State of New York in the case of *Jackson v. Varick*, 7 Cow. 238; 2 Wend. 166, in which it was decided under their statute of wills containing expressions very similar to ours just read, that the power was given to dispose of by will of any property, right, or interest in real estate, whether the same was a vested freehold in possession of the testator or a mere descendable hereditament or interest therein in respect to which the testator had only a right of entry or a mere right of action.

It had been conceded that George Bush, before the happening

of the contingency of Mrs. Leonard's death without leaving issue to survive her, he then having issue living and leaving issue living at his death, had a contingent remainder in fee simple in the real estate devised, or, as it was described in some of the books, "a vested contingent remainder in fee" therein, and by the common law that was a descendible interest, according to the case of *Jones v. Roe*, 3 T. R. 88— it was also divisible, and according to other English decisions it was assignable. 4 *Kent's Com.* 261, 284; *Right v. Coeber*, 11 E. C. L. Rep. 718, and the cases there cited. The whole reasoning of the courts in the case of *Jones v. Roe*, and in that of *Lawrence v. Bayard*, 7 *Paige's Ch. Rep.* 70, and other cases recognized and were based upon that idea. Where one had nothing he could pass nothing. The fact that he has something which can pass from him by descent, or which he can devise or assign, was evidence enough to satisfy any requirement of the law of a present interest in it— whether enough to satisfy the requirements of our statute in that respect was another question which he would meet hereafter. But all contingent possible estates are divisible, says Chancellor Kent, for there is an interest in all of them. *Kent's Com.* 511.

The words land, tenements, and hereditaments include whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed. 2 *Black Com.* 17. They also include certain rights in or to real estate descendible and divisible, although they are intangible and incapable of seizin, as in the case with all incorporated hereditaments. *Jackson v. Varick*, 7 *Cow.* 238; *S. C.*, 2 *Wend.* 166, 205. George Bush died intestate as to the right and interest in the lands and tenements devised to him in fee, as tenant in common with his brother David Bush, by the will of his father, Samuel Bush. It was true that in one respect of the case it did not vest until after his death, which was in the lifetime of Mr. Leonard. Still it was a right or interest in the lands and tenements devised of which the law took notice, recognized, and protected, and which was descendible, divisible, and assignable at law. A contingent remainder in fee descends to his heirs-at-law on the death of the devisee before it vests— *earne on Cont. Rem. and Exec. Devises*, 529. 535—and con-

tingent remainders, both in real and personal property, are transmissible, like vested interests. 4 *Kent's Com.* 284; *Winslow v. Goodwin*, 7 *Met.* 367; *Cook v. Hammond*, 4 *Mason* 467. The claim of dower in this case arising and assignable out of said interest after it became vested in possession, it should be again observed, was not under the common law but under our statute. The question was, Had George Bush a fee-simple title or right to the lands, tenements, and hereditaments in question, of which he died intestate? If he had his widow was entitled to have dower assigned to her out of it. And when should it be assigned to her? On her petition if the real estate at the time of the intestate's death be in his possession, or if at the time of partition prayed it shall have come to the possession of those claiming under him. *Rev. Code* 516, *sec.* 3. This, he had already shown, was an interest which could descend, and which did descend. The very parties who had appeared to oppose the assignment of dower to the widow claimed the same lands and tenements by descent under our intestate laws, the very property out of which she under the same law claimed dower, and the very section of it which gives them their rights as heirs-at-law conferred on her the right of dower. If it was a descendible interest it was also a dowerable interest. *Rev. Code* 514, 515, 508. The rights originate together and run side by side during the life of the widow. Could it be a right in fee simple descendible to the heirs-at-law, and of which they could have partition when they came into possession of it, as they did by the death of the tenant of life and *cestui que trust*, and was it not also the same for the purpose of giving the widow her dower therein? The descent in fee simple to them with the right of dower to the widow, therefore, must stand or fall together.

And such were the views expressed by Chancellor Bates in the recent case of *Isabella Cornog, widow, against the executors of her husband, Abraham Cornog, deceased*, in the Court of Chancery in New Castle County, for he remarked in that case, noting the marked difference between the right of dower conferred by our intestate law and the right of dower conferred by the statute of 1816, "Our intestate law allows to the widow dower,

or, more properly speaking, her thirds, out of any estate in lands, legal or equitable, which descend to the heir-at-law, the policy of this statute being to place the widow on an equal footing with the heir. But for all other cases the right of dower is defined by the statute of 1816, *Rev. Code, chap. 87, sec. 1*, which gives dower only when the husband shall die seized of an estate of inheritance in any lands or tenements within this State." He employed the term "any estate in lands, legal or equitable, which descend to the heirs-at-law," as synonymous with the statutory words in the intestate law, "title or right, legal or equitable, to any lands, tenements, or hereditaments in fee simple." The fact that at the death of George Bush the interest in question had not yet vested in possession made no difference, for that case was contemplated and provided for in the statute. The estate was not in the actual possession of the intestate at the time of his death, but it had come to the possession of those claiming under him at the time of partition prayed *Rev. Code, chap. 85, secs. 1, 3, 4*. If the claimant in dower had issue could that issue by possibility have taken the estate in question? If it could, she was entitled to be endowed out of it. *1 Washb. on Real Property 153, sec. 4, 154, sec. 7*. By construction of the Pennsylvania statute of 1833, which was quite similar to ours in relation to dower in intestate real estates, it was held that there was a dower interest in a vested remainder, although subject at the death of the husband of the claimant in dower to an outstanding life estate in another. *Cotes' Appeal, Law & Eq. Rep., Vol. 1, No. 6, p. 127*.

Contingent and executory interests, whether in real or personal estate, are transmissible to the representative of a party dying before the contingency takes effect on which they depend. *Fearne on Contingent Remainders, etc.*, 554; *2 Saund. 388, n. 1*; *Pinbury v. Elkin*, *1 P. Wms. 564*; *Chauncey v. Graydon*, *2 Atk. 216*; *Peck v. Parrot*, *1 Ves. Sr. 236*; *Barnes v. Allen*, *1 Bro. C. C. 181*; *Perry v. Woods*, *3 Ves. 234*; *Massey v. Hudson*, *2 Meriv. 130*. And the English authorities showed that there was no difference between vested and contingent interests in that respect. In *Chauncey v. Graydon*, just cited, Lord Chancellor *Hardwick* remarked that when either real or per-

sonal estate is given upon a contingency, and that contingency does not take effect in the lifetime of the devisee, yet if real his heir, and if personal his executor, will be entitled to it. In England since the statutes 3d and 4th William IV, dower extends to land in which the husband had a right though unaccompanied with seizin. *Washb. on Real Prop.* 148. It had been held in this State prior to the passage of the present law in relation to real estate of intestates, which was in 1827, and as early as in the year of 1818, that the widow of a *cestui que trust* was entitled to dower. *Cooch's Lessee v. Gerry*, 3 Harr. 283, note a.

Harrington, for the respondents: Samuel Bush, the testator, died August 8th, 1837; George Bush, his son, died intestate September 22d, 1863, leaving a widow, Margaret B. Bush, the appellant, and three children. Rebecca Leonard died March 28th, 1875, without issue her surviving. In the case below in the Court of Chancery in and for New Castle County, for partition of the lands and tenements devised, the chancellor decided that Margaret B. Bush, the widow of George Bush, was not entitled to any right of dower in the real estate subject to partition in the proceedings, nor to any interest on any of the money which should arise from a sale of the same under a decree in the cause.

The laws of Delaware relating to the subject declare that "the widow of any man dying since the 16th day of February, A. D. 1816, who during their marriage was seized of an estate of inheritance in any lands or tenements within this State, shall have the third part of all the lands and tenements whereof her husband was seized as aforesaid, at any time during their marriage, to hold to her as tenant in dower for and during the term of her natural life, free and discharged from all and every alienations, covenants, debts— liens and incumbrances made entered into, contracted, or created by the said husband after the intermarriage, unless she shall have relinquished her right of dower therein by her own voluntary act, according to existing laws of this State." *Rev. Code of 1874*, 533. But the present claim to dower was based particularly upon the act

entitled of "Intestates' Real Estates," wherein it is provided that "when any person having title or right, legal or equitable, to any lands, tenements, or hereditaments, in fee simple, shall die intestate as to the same, such lands, tenements, and hereditaments shall descend in fee simple," etc., etc., subject to the rights of his widow, that is to say, "if the intestate leaves a widow, and also any child or lawful issue of any such child, said widow shall have one-third part of the real estate aforesaid for the term of her life as tenant in dower," etc., etc. *Rev. Code of 1874, pp. 514, 515.*

Dower at common law exists where a husband is seized of an estate of inheritance in land, tenements, and hereditaments, and dies in the lifetime of his wife. She is entitled to have and to hold the one-third part of them for the term of her life as tenant in dower. The seizin of the husband must be during coverture, and must be a seizin in fact or in law. The statute first referred to had long been received as a declaration only of the common-law rule of dower, and the words "seized" and "seizin" employed in it had always been construed in their common-law sense as applicable to legal estate of inheritance only, but by the statute last referred to a widow is dowable out of an equitable estate of her husband in intestate lands only. For all other cases, and for all legal estates in contradistinction to equitable estates, of a husband in lands, tenements, and hereditaments, the right of dower is defined by the statute first referred to. *Case of W. Johnson's Widow, Chancellor Ridgely's Notes, 3 vol. 396, in 1821; Lofland and Wife v. Phillips, Ibid., 4 vol. 152. in 1823; Bloxom v. Hudson, Ibid., 4 vol. 238, in 1823; Case of John M. Darby's Widow, Chancellor Harrington's Note, in 1838.* The object of the act in relation to intestates' real estate, so far as it relates to the rights of dower, was to give the widow dower in the equitable estate of a husband dying intestate, and in that respect to abolish the distinction between the right to courtesy and the right to dower at common law. It was not designed by passing that act, and such was not the legal effect of it, to destroy any of the previous requisites to an estate in dower, except that which confined it to a legal estate. A title or right, legal or equitable, to lands, ten-

ements, or hereditaments, in fee simple, was still the prerequisite.

The question here was alone as to the degree of interest in the lands with which George Bush was invested during coverture or at the time he died intestate. The statute requires title or right in fee simple. What was that? The highest and largest estate, the greatest interest that a person can have or enjoy, the entire interest and estate in the land. George Bush never had such an estate in the lands and tenements in question. The testator devised the lands in trust for his daughter, Mrs. Leonard, for her life, and at her death to her issue living at her death in fee simple. That was the whole estate in the lands. There was a possible contingency that there might be no issue of his daughter living at his death, hence in that event, and upon the happening of that contingency only, he devised them over to his sons David and George Bush also in fee simple, and hence it was that on the happening of that contingency only did any estate whatever come to George Bush or his heirs-at-law. It was but a contingent or executory interest in him, dependent on the uncertainty of Mrs. Leonard's dying without leaving issue to survive her, for if she had left issue to survive her neither he nor his heirs-at-law could have taken any estate in the lands under and by virtue of the devise over to him and his brother David in fee simple. It was therefor but a mere possibility in him, never a vested interest or estate in him, as he died before Mrs. Leonard, and he was never entitled to possession of or to entry into the land.

The following are some of the requisites to entitle a widow to dower at common law and under our dower act. The estate of the husband must be one which the issue of the wife may inherit. The issue should be able to take not only as heir to the father, but also in virtue of a seizin by him during coverture upon which her claim to dower is founded. 1 *Scrib. on Dow.* 216; *Park. on Dow.* 79. The estate of the husband must confer a right to the immediate freehold. Dower is not allowed in estates in remainder or reversion expectant upon an estate of freehold, and hence if the estate of the husband be subject of an outstanding freehold estate which remains undetermined

during the coverture no right of dower attaches. 1 *Scrib. on Dow.* 217; *Durando v. Durando*, 23 N. Y. 331; S. C., 32 Barb. 529; *Green v. Putnam*, 1 Barb. 500; *House v. Jackson*, 50 N. Y. 161; *Otis v. Parshley*, 10 N. H. 403; *Fisk v. Eastman*, 5 N. H. 240; *Arnold v. Arnold*, 8 B. Monroe 202; *Blood v. Blood*, 23 Pick. 80. But to exclude dower the preceding estate must be a freehold interest. An estate for years or other mere chattel interest furnishes no impediment to a title of dower. This distinction is placed upon the ground that such an interest does not interfere with the seizin of the immediate freehold, but rather protects and preserves that seizin, the possession of the party having the chattel interest being regarded as the possession of the owner of the freehold. Where the freehold is suspended during all the time of coverture, no dower attaches. The husband must be vested with the freehold and inheritance *simul et semel*, "at once and together." They must meet in him as one integral estate and not as several or successive estates. 1 *Scrib. on Dow.* 219; 4 *Kent's Com.* 39. The interposition of a vested freehold estate in a third person, between the freehold and the inheritance of the husband, will during the continuance of that estate prevent dower from attaching. The inheritance as well as the freehold must be in possession. 1 *Scrib. on Dow.* 221; *Moore v. Etsy*, 5 N. H. 479; *Dunham v. Osborn*, 1 Paige 634; *Eldredge v. Forrestal*, 7 Mass. 253. The interposition of a *possibility*, so that it be of a freehold nature, between the life estate and inheritance of the husband so long as the possibility exists, will prevent a title of dower from attaching. Its effect is not merely to defeat the right of dower upon the happening of the possibility, but to absolutely prevent it from coming into existence, unless the possibility be determined during the coverture. It is upon this principle that dower is denied to estates held in joint tenancy. 1 *Scrib. on Dow.* 234. George Bush's heirs acquired title directly from the will of Samuel Bush upon the happening of the contingency long after George Bush's death. George Bush never had any title at all.

Patterson replied.

Comegys, Chief Justice: This is the first time, so far as we have any knowledge, that the question whether a widow is dowable of a remainder has been raised in this State. The question has been made by the learned counsel for the widow of George Bush, and has been argued by him with ability and ingenuity, and he asks this court, with a confidence showing his own belief in her right, that we should reverse the decision made against her by the chancellor and sustain this appeal taken by her from it. Having respect only to all the knowledge we had acquired, as students of the law and afterward in our practice at the bar, we should have said unhesitatingly, if the question had been presented for us, without argument made or authority cited, that the decree of the chancellor ought to be sustained. But we felt ourselves required to lay aside, so far as we might, all previous opinions upon the subject, and consider it as one with respect to which we had no impressions whatever. This seemed to us, in justice to the case, as presented by the appellant's counsel, to be the proper course.

Samuel Bush, by his will, dated the 4th day of November, A. D. 1829, and duly proved and allowed by the (then) register of New Castle County, devised, *inter alia*, as follows:

"Item.—I give, devise, and bequeath unto my son, David Bush, his executors and administrators, the following real and personal property, to be held by him and them in trust during the natural life of my beloved daughter, Rebecca, the wife of Frederick Leonard, Esq., to wit: my house and lot, etc., etc. (here describing the property), and it is my mind and will that the said trustee, his executors and administrators, after deducting thereout the necessary moneys for repairs and taxes, pay over regularly and half yearly for the sole and separate use of my said daughter, Rebecca Leonard, during her natural life as a *femme sole*, without any control of or by her said husband, Frederick Leonard, or the creditors of the said Frederick Leonard, the rents, interest, issues, profits, and incomes of the said real and personal estates so devised and bequeathed in trust as aforesaid, and that my said daughter, Rebecca's, receipts signed by her shall be full discharges therefor. And I do give, devise,

and bequeath unto the lawful issues of my said daughter, Rebecca, that shall be living at her decease, all the said real and personal estate so given, devised, and bequeathed as aforesaid in trust for the separate benefit of her, my said daughter, Rebecca, during her natural life, the real estate in fee simple and principal of personal absolutely; but if my said daughter, Rebecca, shall die without issue to survive her, then and in such case it is my will that all said real and personal estates so devised and bequeathed for the sole benefit of my said daughter, Rebecca, during her natural life, shall go to my two sons, David Bush and George Bush, and upon such event I do give, devise, and bequeath the same to them, my two said sons, David and George, their heirs and assigns, forever."

It is not disputable that by the above clause in the will of Samuel Bush there was devised by the testator to his daughter, Rebecca Leonard, a trust estate for life, with a legal contingent remainder in fee simple to any issue she might leave to survive her, and a further remainder in fee, contingent upon the event of her dying and not leaving issue to survive her, to George Bush, the husband of the appellant, and his brother David Bush. It appears, as a fact in the case, that the appellant's husband died in the lifetime of his sister, Mrs. Leonard, the *cestui que trust*, and that she afterward died also without ever having had any issue. The contingency therefore happened upon which the remainder to George Bush, the appellant's husband, and his brother, David Bush, was to take effect in possession; and it did take effect by then vesting in David Bush, living at her death, and in the heirs-at-law of George Bush, who died intestate.

By the law of the land contingent remainders are descendible to the heirs-at-law of those who own them; and therefore, in this case, the heirs-at-law of the appellant's husband, George Bush, became entitled, upon the death of their father intestate, to one equal undivided half part of the premises devised by the testator in the above clause of his will. We are thus brought to the consideration and decision of the question whether or no, by the law of this State, a widow is dowable of an estate of inheritance of which her husband never had any possession nor

the right to any; in the case before us it was a contingent remainder that belonged to him. And we may say that for this question there is, in our opinion, no distinction between a vested remainder in fee simple with an intervening freehold estate outstanding, and a contingent remainder in fee simple. Both, with respect to the question before us, are alike.

What is the law of this State with respect to the right of a widow to any part of her husband's estate of inheritance in lands? The act of the 16th of February, 1816, entitled "An Act respecting devises of land, joint estates, and dower," commonly called the *dower act*, to distinguish it from the intestate law is, in brief, this—that a widow who had not relinquished her right to dower by some valid instrument, shall, for the term of her life, have one-third part of all the lands of which her husband was seized of an estate of inheritance at any time *during their marriage*, free from any alienations, covenants, debts, liens, and incumbrances made, entered into, contracted, or created by him, *since the passage of said act*. This was dower at the common law, except that by such law no alienations, covenants, debts, liens, or incumbrances, made, entered into, contracted, or created by the husband at any time after the intermarriage, could affect the wife's right. The common law was therefore more liberal to the widow than the statute of 1816. It cannot be doubted, we think, and we are supported in so concluding by the case of *Layton v. Butler*, 4 Harr. 507, that the design of the statute of 1816 was to enact the common law in this State, subject to its non-application where the acts of the husband mentioned in it had taken place before its passage. To our minds it is very clear that in this case the appellant can make no claim whatever to dower *under that statute*—her husband having died before his sister, Mrs. Leonard, the *cestui que trust* for life, the remainder, limited to him and his brother upon the contingency of her dying without issue to survive her, never vested in possession in him, and of it, therefore, he cannot, with any propriety, be said to have been *seized*. For *seizin*, as contemplated by that act, means either the actual possession of freehold property with a title to it of an inheritable nature than vested, or a right of virtue of such title to have such possession immediately. Of course, the

appellant's husband had no possession in his lifetime of his remainder, and he had no right to such possession, for the freehold estate was outstanding in those who, under the will of Samuel Bush, were entitled to it. So that on no account could the appellant assert a claim to dower under the act of 1816. This would seem to be very plain, in fact, her counsel does not rest her claim upon such ground, but contends that by the language and the true meaning of the intestate law of this State, *Revised Code of 1874, page 514*, and according to equity she is entitled to have invested for her benefit one-third part of the proceeds of the sale of one-half part of the lands in which her husband and his aforesaid brother had a contingent remainder in fee, so that she may receive the income of it during her lifetime, which is the same as claiming that by such law she, upon her husband's death intestate, became entitled to dower in his contingent remainder *quando* the contingency happened provided for in the will of his father, her plea being that her husband came within the terms of the intestate law, having died intestate of a "title or right," of a *legal* nature in fee simple in "lands, tenements, or hereditaments," to wit, a contingent remainder in fee of one moiety of the real estate devised by the testator in trust for his daughter, Mrs. Leonard, for life. The question then is a simple one, though its solution involves much consideration—Is the appellant entitled to dower in the contingent remainder of her deceased husband? If so, she is, of course, entitled in equity to have the investment made for her benefit of one-third of the proceeds of the sale of one moiety of the real estate devised in trust for Mrs. Leonard for life.

If the question were upon the mere words of the intestate law without any reference to the law of dower as understood by the courts and the bar, we might possibly adopt the view presented by the appellant's counsel and say that her claim is a valid one; for those words are, "*When any person having title or right, legal or equitable, to any lands tenements, or hereditaments in fee simple shall die intestate of the same, such lands, tenements, and hereditaments shall descend in fee simple in coparcenary according to the following course or order, to wit:*" which order is set forth in five clauses immediately following, and then

comes the following language with respect to a surviving husband or wife: "*The descent of intestate real estate shall, in all cases, be subject to the rights of the surviving husband or widow, that is to say,*" * * * * * "*if the intestate leave a widow and also any child, or lawful issue of such child, said widow shall have one-third part of the real estate aforesaid for the term of her life as tenant in dower.*"

The language used by the legislature with respect to the subject of descent is certainly very strong, and considered merely as an abstract expression of the will of the General Assembly, would be hard to treat as meaning aught else than that a man's widow should have her third of every right, legal or equitable, vested and in possession, or contingent only to lands, tenements, or hereditaments of which he died holding an inheritable estate intestate. In this case the appellant's husband had, at the time of his death, and of which he died intestate, leaving her and issue to survive him, a good right in fee simple in a moiety of the lands devised by his father, Samuel Bush, to his daughter, Mrs. Leonard, though such right or title never could be enjoyed in possession but in the event of her dying childless leaving him to survive her. It was more than a mere possibility, however; it was a possibility coupled with an interest, such an interest as was devisable by him, and, in fact, descended under this same statute to his heirs. If it had been a possibility simply, no such question could have arisen as this appeal presents, nor could any such interest have been predicated of it as title or right in any sense. A mere possibility is no estate, interest, title, or right, of which any thought can be taken in a court of law or equity, being nothing in legal contemplation. But a possibility coupled with an interest is a title and a right. Such is a contingent remainder, and such was the estate of the appellant's husband under his father's will. It is unnecessary to cite any authorities to show what a mere possibility is: the expectation of an heir-at-law is such, and is wholly without transferable or transmissible quality. But a contingent remainder has an *interest* legally connected with it and is devisable and descendible, which a mere possibility is not.

It is said that the origin of the law of dower is veiled in the

obscure mists of the past; but the provisions of it, as a common-law right, stand out upon every page of the law of inheritable real estate. As a common-law interest purely, we do not think it can be conclusively held ever to have existed in this State (and we rather incline, upon this subject, to the opinion expressed by the Superior Court in the case of *Coulter v. Holland*, 2 *Harr.* 330, than to that given by the chief justice in the case of *Layton v. Butler* in the Court of Appeals, 4 *Harr.* 507), for the enactment of the law of 1816 was made necessary to place a widow in Delaware upon the same footing as her sister in England held. By the common law the widow's right to a third of her late husband's freehold of inheritance to hold as tenant in dower was free and clear of any alienations or incumbrances of his after the marriage; but that was not the law here from the earliest times, and is not so now except in cases of marriage since the 16th of February, 1816, the time when the act passed. Before that act the widow's right, whatever it was and whence-soever derived, was subject to her husband's debts, however and whenever created. It was to do justice to her, as we may suppose, that the dower act of 1816 was passed. If she had any right before that time that was not created or controlled by the provisions of the intestate laws of the State we have not seen any evidence of its recognition by the courts. It could not be the common-law right, for debts were subordinate to such right; whereas here they were always paramount until the act in question. The language of the intestate law of 1750—24 Geo. II—which superseded all the previous acts (*Vol. I, Del. Laws, p. 284*) shows it; all the modifications of that law made since affirm this also. We will examine the statute law of this State in justification of this view.

The payment of a man's debt seems to have been with those who instituted government in this region an object of such importance that all considerations of family obligation or interest were postponed or subordinated to it. With this subject as illustrative of the sense of justice they entertained we have in this case nothing to do; but we may, we trust not improperly, commend their acts as an example of that stern sense of duty morally which ought to be emulated by their posterity in all their dealings and

transactions, public as well as private—though we may not approve of all that resulted from it. We may condemn the subjection of the wife's right to that of creditors; but they doubtless thought it merely a *prfeerence* among creditors—her rights as a creditor (which a widow is to be considered) being subordinated to theirs. If they treated the matter in that light any one can see how the case of other creditors differed in the view of the early lawmakers from a wife creditor—she obtaining advantages to which they could make no claim, and they having given full valuable consideration or the debts owing to them by her husband.

In accordance with such supposed view of the early inhabitants at a remote period, viz.: in the 34th year of the reign of Charles II, 1682—the date of Penn's feoffment of the three lower counties—an act to be found at page 11 of the *Appendix to Vol. I* of the laws was passed by which lands and goods are made liable to pay debts except where there should be legal issue, and then one-half the land only in case it were bought before the debts were contracted. In the next year (1683) another act was passed (*App. p. 11*) directing how the estate of a person should be disposed of, which provided that one-third should go to the wife, one-third to the children equally, and one-third as he pleased, and in case he left no wife two-thirds to the children and one-third as he should think fit—*his debts being first paid*. (Here was a restraint upon the power of devise.) In the same year (*App. p. 17*) an act was passed directing how the estate of an *intestate* should be disposed of, which provided that it should go to his wife or children, and if he had none to his brothers and sisters, etc. Following this also in the same year (*App. p. 17*) was passed another act upon the same subject but more in detail, by which it was enacted that the estate of an *intestate* should be disposed of by giving one-third of the personal to the wife, and one-third of the real to her during her life, the remainder, with the other two-thirds, to go to the children, the eldest son taking a double share, etc., with a proviso that his or her (the *intestate's*) *debts be first paid*, and that claim by any should be made in three years. In 1688 (*App. p. 18*) another act was passed which subjected lands to

sale for payment of debts, but not until after the expiration of a year from the time the judgment was obtained, so that the owner might redeem upon an appraisement made by twelve men, with a proviso that the chief plantation was to be the last executed. In 1693 (5th William and Mary) an act was passed about testates' and intestates' estates (*App.* 20), which provided more in detail for their disposal, directing that the whole should be liable for debts, establishing the order of their payment, and a rule for the distribution of the residue, with a proviso that where the personal estate was *sufficient* to pay the debts the real estate of testators should be invested and remain as their last wills and testaments devised the same; and one-third of all *intestate* lands to be to the wife for life, the residue to be distributed as before directed with reference to surplus personal estate, with a proviso that an intestate relations or persons concerned who did not lay legal claim within three years should be barred. Afterward, in 1694 (6th William and Mary), an act was passed with provided that where any person should die intestate, being *owner* of lands and left issue, it should be lawful for his widow or administrator, in case of considerable *debts*, charge of child or children, to make sale of such parts or tracts as the county court or council should think fit toward defraying the debts, the education of the children, and the better improving the remainder of the estate to their advantage. (*App.* p. 23.) Then came the law about testates' and intestates' estates, passed in the 9th of William and Mary (1697), subjecting all real and personal estates of deceased persons to the payment of debts and providing that after the debts *are all paid* and where the personal estate was sufficient, the real estate of a testator should be disposed of in manner following, that is, with respect to the estate of testators, that it should go according to the will, provided, that not less than one-third should be *allowed and invested* in the widow during her life unless other equivalent provision had been made for her by the testator, and one-third of all intestate lands to be to her for life, and the residue and remainder to be allotted and distributed in the same manner as the surplusage of intestates' personal estates—the distribution to be made by the register-general, and those to whom shares were allotted to give refunding bonds with surety—and extending

the time for claims by relations or persons concerned to seven years. (*App. p. 24.*) In the 12th year of William III (A. D. 1700) another act was passed with this title, "An Act or ascertaining the descent of lands and better disposition of the estates of persons intestate" (*App. p. 26*), which, "for the prevention of disputes and contests at law or otherwise concerning estates real or personal of persons dying intestate, and *for the more equal payment of the debts,*" provided that all lands, tenements, and hereditaments, and all personal estates whatsoever which any person hath or is *seized* or possessed of, in his or her own right at the time of his death, should be liable to be seized and sold by the executor or administrator, and directing that where the personal estates of testators are sufficient to pay their debts, not less than one-third of the real estate should be allotted to the widow for life, except where equivalent provision had been before made for her by the testator, and one-third of all intestate's lands should go and be allotted to the widow for life, with the same provision as to refunding bond as above. In the same year of 1700 there was passed an act which provides that if any person die intestate, being *owner* of lands within this province or territories thereof, and leave legal issue behind him but no sufficient personal estate for their maintenance, on paying of debts it shall be lawful for the widow or administrator to make sale of such part or parcel as the Orphans' Court should think fit toward defraying the just debts of the intestate, the education of his children, and improving the remainder of the estate (if any be) to their advantage. (*App. p. 30*) We now pass forward to the year 1706 and find the act entitled "An Act for ascertaining the descent of lands and better disposition of the estate of persons dying intestate," which (following substantially the first act above referred to of the 12th of William III) provides, *inter alia*, that after *intestate's debts have been paid*, widow to have one-third for life. (*App. p. 50.*) Then, after a long interval, came the act of 1721 (*App. p. 55*) "for the better settling of intestates' estates," which law applies to personal as well as real estate, and contains, with others, a provision that if any person die intestate, being *owner* of lands and tenements and leave issue and no sufficient per-

sonal estate to pay his debts and maintain his children, his executor or administrator may sell such part of the land for that purpose as the Orphans' Court may direct from time to time—provided that no lands contained in any marriage settlement should be so disposed of contrary to the form and effect of the settlement, and after other provisions with respect to division of the land not necessary to be sold for payment of debts, called *surplusage or remaining part*, among the heirs as tenants in common, contains a clause enacting that the widow of the intestate shall have the full third as her dower in the lands whereof her husband died *seized*, which dower she shall hold as tenants in dower do in England. This repealed the act of 1706. This act was followed by that of 1742 (*App. p. 61*), which repealed all prior acts for the settling of intestates' estates, but re-enacted substantially most of the essential provisions of the repealed acts—providing among other things that where persons died intestate, being *owners* of land and who should not have disposed of the same in his or her lifetime by will or otherwise, the widow should have one-third unless otherwise provided for by marriage settlement; and it is afterward provided that in case of a deficiency of personal estate to pay the debts and maintain the children, it should be lawful to sell the land for the purpose, but not any contained in a marriage settlement, the sale to be made if allowed by the Orphans' Court. This act remained in force until the 24th of George II (A. D. 1750) when it was in turn repealed, and another act (*vol. 1, p. 284*) passed in its stead, being an act “for the better settling intestates' estates” (which is the same in substance as the act last cited), the 10th section of which subjects the widow's third given her by the 5th section of it, as well as the residue, to sale for the payment of debts and the maintenance of the children, with a provision that no lands and tenements contained in any marriage settlement should be sold or disposed of contrary to the form and effect of such settlement. It is true that subjection of the wife's right is not made in terms, but the provisions of the 10th section, as well as similar ones in the repealed acts, are inconsistent with any other construction, keeping in mind what we have assumed as the purpose of our ancestors, to do exact justice to

pecuniary creditors, and prefer them to any claiming by or through the husband except with reference to settlements before marriage in favor of the wife. This view of the purpose of the early settlers of this region with respect to the estates they might leave enables us to understand all their legislation we have referred to; without taking it we should be involved in a maze of confusion and difficulty. The property of a deceased person, both real and personal, should, in their opinion, be subject in all cases to the payment of debts before any claim was to be made upon it by those who founded their right upon their connection with him. As the widow was in such respect *in pari materia* with his heirs or devisees, her claim was subordinated or postponed to that of creditors simply.

The law remained thus until the passage of the act of the 16th of February, 1816, before mentioned, which is in brief as before stated, and is to be found on page 533 of our last code. This act established a different rule and conformed the law of this State to the English or common-law rule of dower, except that by it all debts contracted before the act passed had still a preference over dower. [It is an interesting fact that opposition was made to the law because it subordinated debts made afterward by the husband to the widow's claim, and that the late Judge Hall expressed in writing while the bill was on its passage his objection upon that ground.] At this time the statute of 1816 is practically the same as the common law of England was at the time it was passed, and all debts created by the husband alone after marriage are subject to the wife's dower. Her claim is preferred to that of other creditors, for, as before said, she is a creditor as well as they, and was thought in 1816 a more meritorious one, being, in legal contemplation, a purchaser of her right when she became wife.

It may be thought that all this has really nothing to do with the present appeal, which is from the chancellor's decree denying the widow of George Bush, the appellant, her claim to have one-third of the proceeds of one-half of the real estate devised by his father, Samuel Bush, in contingent remainder to said George invested for her benefit. It is true that to a certain extent it has nothing to do with that question, because

George Bush did not leave any debts to be paid out of it, but it has something to do with the question considered, what was the law of dower in this State prior to 1816; it being our view that never until that act was passed had she any such claim of dower as widows had in England down to that time, although her estate, after assignment, was legally the same. And we thus agree with the Superior Court in *Coulter v. Holland*, before referred to. We have entered upon the consideration of her right generally, as it was understood in this State to sustain our position and that of the Superior Court, that hers was not the common-law right, strictly, because of liability to debts. The intestate law recognized her right, as at common law, but as subject to debts.

Having disposed satisfactorily to our minds of the nature of the widow's right to dower in this State down to 1816, it is not necessary to consider whether that act did or did not modify the law of the State then existing as we have construed it, because the claim made in the case before us is not under that act, but under the intestate law of 1827, which repealed all former acts, such law having been continued in substance to this time. And to be entirely just in all respects, we call attention to the fact that although the word *seized*, in two of the acts before cited, would indicate, we think certainly, that a legal estate in fee simple was in the contemplation of the makers of the law, yet the term *owner* is used in the later acts, which would seem to warrant the conclusion that by adopting it the legislature intended a meaning of wider significance than the term *seized* applied to an intestate person would bear. We might feel inclined to yield to such inference were we left to our own notions of what the legislature meant by the use of that term, for it is a broad one and embraces, seemingly, every sort of inheritable interest of which a person might die intestate. But we are not left to our own impressions merely upon that subject for, in the first place, it did not embrace equitable estates so as to give dower in them, nor, secondly, was it treated as having any other meaning than that of a person *seized*; the three cases presently to be cited upon the point of *seizin* sustains the first view, and the last is supported by the cases of *Joseph Walton*, *petitioner*,

v. *Priscilla Carlisle*, heard by Chancellor Ridgely, in the county of Sussex, on the 21st of July, 1819, and which required that the meaning of the term *owner* in the intestate laws then in force should be given. It was a case for division, but where the intestate was not in possession at the time of his death, and the chancellor dismissed the petition, denying partition of the premises because the intestate "*did not die the owner*" of the land, "*that is, he was not seized and possessed of it at the time of his death.*" Afterward several cases were heard before the same court, two in that county and one in Kent, involving the same question substantially—that is, what kind of *ownership* was necessary to give a widow dower in the lands of her husband, and in each of them it was distinctly held that he must have had *legal seizin*, such as gave him at law the right to immediate possession, whether he had such possession or not. These cases are cited in the brief of the counsel for the appellees and are the following: *Whittington Johnson's Widow*, Kent, 3 Ch. Ridgely's Notes 396 (1821); *Lofland and Wife v. Phillips*, Sussex, 4 Ridgely's Notes 152 (1823); *Bloxom v. Hudson*, Sussex, 4 Ridgely's Notes 238 (*Ibid.*), the last of which was decided in 1823, four years before the act of 1827. Whatever may have been the view of the law with some with respect to the rights of a widow to dower or thirds, it would seem to be quite certain that, down to the time of the last of these cases at least, there was no doubt in the minds of the bar of this State that the dower right was subordinate to debts created before the act of 1816 passed, and that where it was claimed under the intestate law it was not only subject to all debts whenever contracted, but could only exist at all where the husband was *seized* at the time of his death—the term *owner*, according to such high authority as Chancellor Ridgely, meaning a person *seized*—a proprietor of a legal estate of inheritance in possession.

In 1827 the intestate law was re-enacted, but modified so as to place widows of *cestuis que trust* dying in possession of the trust estate upon the same footing as those of legal tenants of the present inheritance. Such we understand to have been the chief design of the modification, if not the only one, and as that act was passed fifty years ago, and with respect to its essential lan-

guage concerning the question before us has never been altered, we are required to give it a construction warranted by the import of that language as we understand it. In the absence of any personal knowledge concerning the use of the terms employed in the act of 1827 to define the kind of estate that was to be the subject of assignment of dower and division in the Orphans' Court, we are compelled to rely upon what would seem to have always been the understanding of the profession as to their meaning, which is that they were not intended or supposed to enlarge that of the word *owner*, as used in the later acts we have cited and which had before received the judicial interpretation given to it in the case of *Walton v. Carlisle*. The words *title or right* in that statute, and as employed in the subsequent re-enactment of it in both codes of 1852 and 1874, have always been understood, where a legal estate was the subject, as not amplifying the sense of the word *owner* previously employed, but as intending to express the legal notion of proprietorship of an inheritable estate in possession, and this view is strengthened by the provision in them that proceedings for partition shall not be taken with respect to lands not in the actual possession of the intestate at the time of his death, etc. Such provision must, we confidently think, have been used to adapt the law to the views expressed by Chancellor Ridgely with respect to the meaning of the term *owner*—that is a person *seized*. It so, then *ownership* of lands, held by legal title, and *seizin* of them are convertible terms, and the chancellor was right in his decree. The fact that it was not appealed from would seem to be conclusive of acquiescence by the profession in it.

Taking this view, how can George Bush, the husband of the appellant in the case before us, be said to have had at the time of his death such title or right as entitled her to have invested for her benefit a third part of the lands devised in contingent remainder to her husband and his brother? We do not see how it can be. He surely had no *seizin*, nor the right to any, because he died while a valid legal estate (that of the trustee of Mrs. Leonard) was outstanding and undetermined. There is no case to be found in the jurisprudence of this State where a widow was given dower (except in equitable estate since 1827) unless

her husband had a legal *seizin* of an inheritable estate at some time during the coverture. The freehold as well as the inheritance must be in the husband or no right of dower can attach. This is an elementary principle of the law of dower familiar to every student even. The freehold in this case never was in George Bush under his father's will, but was outstanding, as before said, and he died before the event happened which could vest in him his contingent remainder. To sustain the widow's claim in this case would, we think, be overturning all the rules of law with respect to right of dower, which rules apply to such rights here as well as at common law. There is no modification of the common-law *title* to dower in this State except that equitable estates are included in the intestate law. It is true that in a case of application under that law, where the widow and heirs all claim from or under the same person, the heir is not allowed to dispute the *seizin* of the husband because his own claim is founded upon it (*Griffith v. Griffith*, 5th Harrington, p. 5), but in this case the right of George Bush's children does not depend upon his *seizin*, for it never existed, and they can resist as a stranger could. We have been referred to a case in Pennsylvania by the appellant's counsel, that of *Cote's Appeal*, decided in the Supreme Court of that State (No. 6, Vol. 1, *Law and Equity Reporter* 197) which seems in conflict with this opinion; but that decision was made under a peculiar act of assembly of that State, which treats the widow more as a party taking by descent than otherwise, and blends together the real and personal estate of a decedent; her claim under that law can hardly be called *dower* as we understand that term, and as dower is secured to her in legal estates under our intestate law, with respect to which law no one has ever suggested in a court of this State that the *dower* there, whether recognized as her right or conferred by its provisions, is in any sense different from that enjoyed by widows under the common law, except that it is subordinate to the payment of the intestate's debts. We are neither bound by nor have we any inclination to follow the Pennsylvania decision, founded, as it is, solely upon the intestate law of that State, for by so doing we should oppose our own sense of right in the case

before us, and also the understanding of the profession in this State as to the law of dower or thirds.

I am, therefore, of the opinion that the decree of the chancellor should be affirmed.

Wales, J.: Samuel Bush devised real and personal property to his son, David Bush, in trust for the sole use and benefit of the testator's daughter, Rebecca Leonard, during her natural life, and to the issue of the said Rebecca who might be living at the time of her death, "the real estate in fee simple and the principal of personal absolutely;" but should Rebecca die leaving no child to survive her, then to his two sons, David and George, in fee. Rebecca Leonard survived her father and her brothers, David and George, and died without issue. Proceedings have been instituted in chancery for the partition of the real estate thus devised, the widow of George Bush claimed dower in the share to which her husband would have been entitled had he survived his sister, Rebecca. The chancellor decided against the claim on the ground that George never had an equitable estate in fee simple, or such an estate of freehold and inheritance at one and the same time in the land devised by his father as would support the widow's right of dower. From this decision an appeal has been taken.

At common law the right of dower could not attach upon any estate of which the husband had not been *seized* either in deed or in law at some period during coverture. A mere right to or interest in land, unless accompanied by technical seisin, was not sufficient to confer a title of dower. Conveyance by feoffment and livery of seisin was never generally adopted in this country, and in Delaware legal seisin could always be acquired by deed of bargain and sale, by descent, devise, or assignment; but notwithstanding that the solemn formalities of actual livery which were once required by the law of England were never recognized in this State, the rule of the common law making a legal estate in the husband a prerequisite to the right of dower was retained in force until the year 1827, when by a statute passed in that year the estate of the husband subject to dower was enlarged so as to embrace lands, tenements, and heredita-

ments to which he had "title or right, legal or equitable," it fee simple, and it is upon the construction of this statute than the appellant claims to be dowerable in the lands devised to her husband. It is contended that George Bush had a contingent interest in the land which he might have conveyed away or assigned during his life and also an estate of inheritance, and that both combined invested him with a dowerable estate. But this position is not sustained by precedent or principle. Dower is not allowed in estates in remainder or reversion expectant upon an estate of freehold, and hence if the estate of the husband be subject to an outstanding freehold estate which remains undetermined during the coverture no right of dower attaches. 1 *Scrib. on Dower* 218. In this case there was an outstanding freehold in a trustee for the benefit of Mrs. Leonard which was determinable at her death, and only on the failure of issue surviving her was one-half of the real estate to go to George Bush. So that, dying in the lifetime of Mrs. Leonard, he never had an estate of freehold, or an estate in fee simple, legal or equitable. His interest was purely a contingent one.

Mr. Park, in his treatise on Dower, puts a parallel case. To let in the title of dower the particular estate must determine or be destroyed in the lifetime of the husband. Although the wife should survive the husband, and afterward, during her life, the particular estate should determine, she would not thereby acquire any right to be endowed of that estate, because there was no seizin during coverture of such an estate as her title could attach upon. *Park on Dower* 76. It is true, dower is here excluded for the want of legal seizin in the husband, but in a preceding part of the treatise he lays down the general rule that the estate of the husband should confer the right to the immediate freehold, that is, the first estate of freehold, bestowing the present enjoyment except so far as that enjoyment may be subject or postponed to terms for years or other chattel interests. *Ibid.* 53. The question here is whether the husband of the claimant had "title or right, legal or equitable, in fee simple." Under his father's will he had a contingent interest liable to become vested upon the death of Mrs. Leonard without issue during his lifetime, but that event did not happen, and therefore no freehold

estate was vested in him. On his death his heirs took, not by descent but by limitation in the will of Samuel Bush, as contingent devisees, and thus he had no estate of inheritance. *Adams v. Beekman*, 1 *Paige* 631. It does not appear that he ever had an equitable estate in fee simple as required by the statute under which this claim for dower is made. This statute did nothing more than to extend the dower right of the widow to equitable estates in fee as well as to legal estates, but did not remove or extinguish the other prerequisites to dower as established and enforced at common law. One of these conditions is that the freehold and the inheritance must be in the husband *simul et semel*, "at once and together." There must be no intervening vested freehold estate in a third person between the freehold and inheritance of the husband; the inheritance it well as the freehold must be in possession. In other words as must be the immediate inheritance and not an inheritance expectant upon an estate of freehold in any other person. The interposition of a mere possibility, so that it be of a freehold nature between the life estate and inheritance of the husband, will, so long as the possibility exists, prevent the title of dower from attaching. Its effect is not merely to defeat the right of dower upon the happening of the possibility, but to absolutely prevent it from coming into existence unless the possibility be determined during the coverture. 1 *Scribner on Dower* 234; *Park on Dower* 72; and the cases there cited. It is upon this principle that dower is denied to estates held in joint tenancy—the possibility of survivorship operating to prevent dower from attaching.

Dower is a meritorious claim and is favored at law, but should not be allowed in contravention of well-settled principles and rules. These may appear to be artificial and unreasonable in their application to particular cases, but they have been established and recognized for such a length of time in determining questions of this kind that, in the absence of special legislation, it would be dangerous to depart from them, and in no other branch of the law of real property is it more vitally important that courts should adhere to the maxim *stare decisis*.

Wootten and Houston, Judges, concurred.

JOHN V. RICE, Administrator of JAMES RICE, deceased, complainant below, appellant, *v.* WILLIAM G. PENNYPACKER Executor of ACHILLES HOLLINGSWORTH, deceased, AMOR H. HARVEY, and SUSAN Z. HOLLINGSWORTH, defendants below, respondents.

The statute of 1859, enabling parties in civil suits to call the adverse party a witness, does not render competent a party who, although adverse upon the record, is otherwise incompetent as a witness for the party calling him by reason of interest.

Real estate, suitable for the business of a firm, was bid off in the year 1849, at heriff's sale, by A. H., a partner of the firm of H., H. & Co., and title taken in his own name, part of the purchase-money being paid in cash out of the funds of the firm, and the balance secured by liens upon the property, of which liens most of the interest and so much of the principal as was paid prior to the death of A. H. were systematically drawn from the funds of the firm. The larger portion of the property was used by the firm for its business, and no rent paid or charged, rents from other portions being received by the firm, A. H., the purchasing partner, having charge of the firm's books. The evidence disclosed facts which warranted the presumption of an understanding or agreement among the partners that the property was purchased in trust for the firm, and that it was so held up to the death of the purchasing partner in 1865. The firm dissolved in 1854 by the retirement of J. R., the complainant's intestate, but no settlement was made with him, and the business was continued by A. H. and A. H. H., the remaining co-partners, under the same firm name. Upon bill filed in 1873 by the administrator of J. R., *held* that the real estate, which since the death of A. H. had been held by his widow as devisee, was subject to a resulting trust as partnership property, in favor of the first firm of H., H. & Co., and that the complainant was entitled, as administrator of his father, J. R., to one-third of the proceeds thereof.

In the absence of fraud or breach of trust, property purchased with partnership funds does not of necessity become partnership property if that is not the intention of the parties.

The circumstance that the payment has been made out of the partnership funds, especially if the property purchased be necessary for the ordinary operations of the partnership business and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property, and in the absence of all countervailing circumstances it will be absolutely decisive.

Claims of complainant for partnership balance due his intestate in 1854, for advances to the partnership by way of loans and otherwise, *held* to have been barred by the lapse of time. These claims having been barred before the death of the intestate, no diligence on the part of his administrator could relieve them from the bar of the statute.

The acknowledgment by a former partner that these claims were subsisting and unpaid, *held* insufficient to revive them as against the representatives of his deceased copartner.

A partner's lien, even upon the real estate of his firm for advances made to it, is a personal lien purely, in equity, and expires with the extinction of the claim by the bar of the statute.

THIS was an appeal from the decree of the chancellor sitting in and for New Castle County, and was heard before Comegys C. J., and Wootten, Houston, and Wales, Judges, at the last and held under advisement until the present term of this court. The case as presented on behalf of the appellant in his bill of complaint in the court below was substantially as follows: In the year 1841 a firm consisting of Jacob Pierson and Achilles Hollingsworth was engaged in trade as machinists and blacksmiths in the city of Wilmington, under the name of Pierson & Hollingsworth, with a partnership capital of about four thousand dollars, when Amor H. Harvey was admitted into an equal copartnership with them in the business upon his contributing the sum of two thousand dollars as part of the capital of the new firm, the name of which then became Pierson, Hollingsworth & Harvey, and that in the month of January, 1842, the said Jacob Pierson withdrew from it on selling his interest in it to James Rice for two thousand dollars, who was thereupon admitted into it as an equal partner with the said Hollingsworth and Harvey, when the name of the firm was changed to Hollingsworth, Harvey & Co. He, however, never became an active member of it, as he was otherwise engaged in the foundry business, which prevented him from taking an active part in the transaction of its business.

In the year 1849, and for some years prior to that time, James Hollingsworth and James Teas were engaged as partners in the like business in that city under the firm name of Hollingsworth & Teas, and as such partners held and owned certain real estate in it, while each of them also held and owned certain other real estate in it as his separate property, and as such firm had become indebted to the firm of Hollingsworth, Harvey & Co., in a certain judgment in the Superior Court in and for said county, it being No. 424, May term, 1848, in the real debt of two thousand

six hundred and fifty dollars, and also to the said James Rice separately in two judgments in that court, being respectively numbered 425, May term, 1848, for the real debt of one thousand five hundred dollars, and No. 232, November term, 1848, for the debt of one thousand two hundred dollars, which judgments, however, were subsequent and subordinate to sundry other liens in favor of several other parties existing against the real estate of the firm of Hollingsworth & Teas, and also against the separate real estate of each of the members of it, amounting in the aggregate to more than ten thousand dollars; and that the real estate of the said James Hollingsworth was additionally incumbered in the years 1848 and 1849 by a first mortgage made by him and his wife to the Wilmington Savings Fund Society for the sum of two thousand six hundred dollars, on which judgment had been recovered in the same court, being No. 185, May term, 1849, on which a writ of *levari facias* had been issued returnable to November term, 1849, in order to effect a sale of the real estate embraced in it; and by virtue of a writ of *fieri facias* returned to May term, 1849, and a writ of *venditioni exponas* thereon returnable to November term, 1849, issued upon the judgment of James Rice against the firm of Hollingsworth & Teas for one thousand two hundred dollars, the real estate of that firm, and also the separate real estate of each of the members of it, were levied upon, condemned, and advertised for sale by the sheriff of the county.

That during the time of the legal proceedings last referred to, it was agreed and determined on by and between the members of the firm of Hollingsworth, Harvey & Co., either to purchase the said real estate of the firm of Hollingsworth & Teas, and of James Hollingsworth and of Joseph Teas, or at least to bid it up at the sheriff's sale to an amount sufficient to cover the said indebtedness of the firm of Hollingsworth & Teas, both to the firm of Hollingsworth, Harvey & Co., and to James Rice individually, the object of any such purchase which might be so made by their firm being to recover the amount of its judgment, and also of the judgment of James Rice for one thousand five hundred dollars against the firm of Hollingsworth & Teas, either by a speedy sale of the said real estate by their firm, provided it could be sold

for the required amount, or otherwise by retaining and using it as partnership property, and that the said judgment of James Rice for one thousand five hundred dollars so entered into the consideration of their firm, for the reason that they looked upon the claim in the same manner as if it were a claim of the firm of Hollingsworth, Harvey & Co.; but James Rice did not wish to have his name connected with the legal title to the said real estate, as he was not an active member of the firm of Hollingsworth, Harvey & Co., and was otherwise engaged in the foundry business, and he therefore suggested that the title should be taken in the name of Archilles Hollingsworth, stating that it did not matter in whose name the deed was taken, inasmuch as he was to keep an accurate account of all moneys paid for and received from it; and in pursuance of that suggestion and of the determination and purpose of the firm, as before stated, Archilles Hollingsworth was authorized by it to attend the sheriff's sale of the said real estate and buy the same if it should not sell for a sufficient sum to cover the said judgment of the firm of Hollingsworth, Harvey & Co., and the said judgment of James Rice, on account of and for the use of that firm, and to take the legal title to it in his own name.

That afterward, on the 18th day of August, 1849, all the said real estate was sold at sheriff's sale, that of James Hollingsworth, covered by the said mortgage, for the sum of four thousand dollars, and all the rest of the real estate, together with all the said real estate of the firm of Hollingsworth & Teas and of Joseph Teas, for the sum of six thousand and forty dollars; and that Archilles Hollingsworth, pursuant to the agreement and determination of the firm and the authority given him for that purpose by it, attended the said sale in company with both of his partners, and bought all the said real estate so sold at it for the sums before stated, and which consisted of the following described parcels: No. 1, beginning at a stake on the southerly side of Second Street, at a distance of one hundred and twenty one feet from the easterly side of Poplar Street, at a corner of Enoch Moore's lot, thence with said Moore's line south thirty-two degrees west, parallel with Poplar Street one hundred and sixty-three feet to a stake, thence north fifty-eight degrees west,

parallel with Second Street twenty-one feet to a stake, thence north thirty-two degrees east six feet four inches to a stake, thence north fifty-eight degrees west twenty-eight feet to a stake, thence south thirty-two degrees west twenty-eight feet to a stake, thence south fifty-eight degrees east fourteen feet to a stake, thence south thirty-two degrees west seventy-three feet to the northerly side of Front Street, thence and thereby south fifty-eight degrees east, about seventy-four feet six inches to the northerly side of the Philadelphia, Wilmington and Baltimore Railroad, and thence and thereby north eighty-six degrees east, about eighty-six feet to a stake in the said side of the said railroad, being a corner of Charles King's land, thence by the said King's land north twenty-seven and one-half degrees east, about ninety-one feet to a Stake in a line of land of Levin Manlove, said stake being distant one hundred and sixteen feet from the southerly side of Second Street, thence along said Manlove's land, north, fifty-eight degrees west about twenty-two feet six inches to a corner stake in the said line, thence by another line of Manlove's land north, thirty-two degrees east thirty-six feet to a stake in line of land of Henry Gottschammer, thence by the said line of Gottschammer north fifty-eight degrees west nineteen feet to a corner stake in said line, thence by another line of the said Gottschammer north thirty-two degrees east eighty feet to the said side of Second Street, and thence and thereby north fifty-eight degrees west seventy-five feet to the place of beginning; and No. 2, beginning at a stake in the southerly side of Third Street, at the distance of one hundred and thirty feet six inches from the easterly side of Poplar Street, at a line of land now or formerly of Abraham Rothwell, thence with the said land southerly parallel with Poplar Street one hundred feet to a stake, thence easterly parallel with Third Street twenty-one feet to a stake, thence northerly parallel with Poplar Street one hundred feet to the said side of Third Street, and thence and therewith westerly twenty-one feet to the place of beginning.

That the firm of Hollingsworth, Harvey & Co., by and through Achilles Hollingsworth, and by and through him only as the agent of that firm, bought all of the said real estate sold at the said sheriff's sale for the use and benefit of the firm and

for no other purpose, and that pursuant to the sale thereof the sheriff, by deed poll dated the 28th day of December, 1849, conveyed to him in fee simple the real estate of James Hollingsworth and wife sold by the sheriff on that day under the writ of *levari facias* for the sum of four thousand dollars, but for the real estate of the firm of Hollingsworth & Teas, and of James Hollingsworth and Joseph Teas sold by the sheriff under the writ of *venditioni exponas* to him for the sum of six thousand and forty dollars no deed appears of record from the said sheriff or from any other person or persons to him, notwithstanding he purchased the whole of the said real estate last referred to for the sum last mentioned under the authority and for the use and purpose before stated, except two indentures, one being from James Hollingsworth and wife dated the 28th day of August, 1849, for the consideration as therein stated of three thousand eight hundred dollars, which, however, is alleged in the bill to have been merely nominal, and that the deed was given for the purpose merely of barring the right of dower of the said wife in said real estate; and the other being from the same persons dated the 23d day of October, 1849, for the consideration as therein mentioned of one thousand four hundred dollars, which is also alleged in the bill to have been merely nominal and that it was likewise made and delivered for the like purpose. That the purchase-money paid for the said real estate was furnished wholly and directly from the partnership funds of the firm of Hollingsworth, Harvey & Co., and neither wholly nor in part from the individual funds of the said Achilles Hollingsworth, nor from him on his individual account, through the instrumentality of a loan or loans from the firm to him, or any other source or sources whatever, nor from the partnership funds in consideration of any loan or loans made by him to the firm; and that it was purchased in pursuance of the agreement and for the uses before stated in order to cover the claim of the firm under the judgment for the said sum of two thousand six hundred dollars, and of James Rice upon one or both of his said judgments amounting together to the sum of two thousand seven hundred dollars, for the reason that in view of its availability for the purpose of their partnership business, and of the existence

of said liens, apart from other considerations, it was worth more to the firm than the sum for which it was sold at said sheriff's sale; and inasmuch as the firm had authorized him to bid it up to such an amount as would cover all the said claims, and he had succeeded in bidding it in for a sum less than that amount, the judgments last mentioned did in fact constitute a portion of the consideration and a material inducement upon which it was so bought by him for the use and benefit of the firm as aforesaid, and such purchase of it had never been productive of any benefit or advantage either to the firm or to James Rice by reason of said judgments except in so far as the benefit and advantage may have accrued to the firm from the possession, use, and ownership of it, may have exceeded the price at which it was purchased at the said sale, and, therefore, the existence of the said judgments would furnish a good ground for a just claim in equity on behalf of the said firm and James Rice to the said real estate independent of and in addition to such equitable rights thereto as would result to them as members and partners of the said firm from the purchase of it by him as aforesaid. And upon the supposition that the purchase of it was based in part upon the consideration of the said judgments as before stated, the members of the said firm afterward at his request released the said Joseph Teas from all further liability thereon, alleging as their reason therefor, that as they had thus got all there was of the property, they did not wish to hold him liable any longer upon them. But afterward, in or about the year 1860, Achilles Hollingsworth applied to Joseph Teas, who was then in more prosperous circumstances, to pay him something on the said judgment of the firm of Hollingsworth, Harvey & Co. against him, and upon such application he paid him the sum of about one thousand one hundred dollars, when Achilles Hollingsworth requested him to say nothing to James Rice about his having made him such payment on the said judgment; and that neither he nor Achilles Hollingsworth ever mentioned the matter to James Rice, and that James Rice never knew the fact that such payment had been made upon it, the intentional concealment of which from James Rice constituted a gross fraud, in fact, upon his right as a partner in the said firm as aforesaid.

That at the time of the sale of the said real estate so bought by the firm of Hollingsworth, Harvey & Co., through the agency of Achilles Hollingsworth, there were situate upon it some buildings and structures which the firm of Hollingsworth & Teas had used in their business as machinists and blacksmiths, and which by slight alterations were made suitable and convenient for the business of the firm of Hollingsworth, Harvey & Co. as at that time conducted; and there was also at the same time a considerable amount of machinery affixed to the said real estate, a large portion of which was taken out and sold immediately after the said purchase by the firm of Hollingsworth, Harvey & Co., and that the proceeds of the sale thereof went into the possession of and were appropriated by that firm for their own use and benefit, and that no claim was then set up to them by Achilles Hollingsworth, and that he did not at the time of the purchase of the said real estate assert any claim or entertain any idea of setting up any claim that he had purchased it for his individual use and profit. And although the legal title to the same was vested in him, it was possessed and used in common by the first firm of Hollingsworth, Harvey & Co. for the purposes of its business from the time of its acquisition until the dissolution of that firm, and afterward in the same manner by the succeeding firm of Hollingsworth, Harvey & Co., until the dissolution thereof by the death of Achilles Hollingsworth in the year 1865; and that neither James Rice nor his legal representative had or have released or conveyed his or their interest in the said real estate to any person or persons whatever. That the property was repaired from time to time during the continuance of the first firm of Hollingsworth, Harvey & Co., and was repaired and improved wholly at the expense of that firm, and that all payments for taxes, insurance, and other expenses incident to the ownership of said real estate were wholly made by the firm last mentioned out of their own funds and for their own benefit. And that the rents and profits of so much of it as was not in actual use in the business of the firm by the permission of it were collected by Achilles Hollingsworth as the partner who had charge of the finances and accounts of it, and were supposed by the other members to be

properly entered in the books on account of it and duly accounted for, but which were from time to time as they accrued, fraudulently and in violation of the trust reposed in him by his said partners, appropriated by him to his own use, and were totally unaccounted for with some exceptions as appears by the books of account of the firm, although the legal title to the said real estate, including a machine shop and several tenement houses, was vested in him as before stated, with the understanding among all the partners that he should keep an accurate record of the receipts and expenditures on account of the same, which he not only failed to do, but he was also guilty of many and gross irregularities in keeping the accounts of the other transactions of the firm.

In the beginning of the year 1854, the firm of Hollingsworth, Harvey & Co. was laboring under considerable financial pressure, while James Rice was also individually laboring under great pecuniary embarrassment owing to the very large cash advances he had found it necessary to make from time to time to the firm for use in its business, which was rapidly increasing, and that Achilles Hollingsworth requested Amor H. Harvey to say to James Rice that if he would withdraw quietly from the firm that it would in time pay him in full, and so enable him to pay his creditors, but if he remained in the firm holding so many of its obligations, consisting of memorandum checks for individual money loaned the firm and for open partnership and private accounts, his creditors would force the firm into liquidation, and there would be such a sacrifice of its property as would ruin it without benefiting them, and upon that representation after much persuasion and some lapse of time he withdrew from the firm with the knowledge and consent of his principal creditors; and after such withdrawal that the firm obtained a considerable extension of time from its creditors, and from some of them as much as five years; but in consequence of the embarrassments of the firm at that time no settlement was had or could be had between James Rice and the other members of it on his withdrawal from it owing to its large indebtedness to him, as well for moneys advanced to it by him as for his interest as a copartner in the property and business of it.

It was next alleged that Achilles Hollingsworth died in the month of June, 1865, having duly made and published his last will and testament, whereby he gave all his property, real and personal, after the payment of his debts, to his wife, Susan Z. Hollingsworth, forever, and appointed William G. Pennypacker his executor, which was soon afterward duly admitted to probate by the Register of Wills of New Castle County, and by whom letters testamentary were thereon granted to the said Pennypacker, and that under and by virtue of it the legal title to the said real estate devolved upon Susan Z. Hollingsworth, and that since the death of Achilles Hollingsworth all the rents and profits of it, amounting to nearly two thousand dollars per annum, had been received and appropriated by the defendants, William G. Pennypacker and Susan Z. Hollingsworth, or by one or the other of them, and still continued to be so received and appropriated.

That Achilles Hollingsworth was a practical bookkeeper, well versed in bookkeeping, and for that reason was intrusted by his copartners, James Rice and Amor H. Harvey, with the entire care and management of the books, accounts, and finances of the firm last mentioned from its creation until its dissolution, and afterward until his death, but neither Amor H. Harvey nor James Rice knew anything about the practice of bookkeeping, and both of them reposed during the continuance of the partnership implicit trust and confidence in his integrity and ability, and that James Rice was merely a dormant partner in the firm last aforesaid, and as such he had no control over the management of its affairs or business, and did not in fact interfere with the same. And in addition to the equitable obligation which rested on the said Achilles Hollingsworth solely from his relations as a partner to keep correctly and accurately the books, accounts, and financial affairs of the firm, there was imposed upon him, by reason of the facts immediately before stated, an obligation in equity and good conscience more stringent and imperative than the ordinary obligation of a partner to discharge faithfully and honestly the trust which was thus specially reposed in him, and to keep the said books and accounts and financial matters with more than ordinary diligence and accuracy. But in addition to

his utter failure to discharge the obligation just mentioned, the bill of complaint further alleged that he was guilty of and did commit, both in his manner of keeping the said books of account and otherwise, gross and palpable acts of fraud against his partners, of which an instance had already been set forth in the fact before stated that when Joseph Teas upon his solicitation voluntarily paid him the sum of one thousand one hundred dollars or thereabouts still due upon the judgment of the firm against him but which had before that been released by the firm for reasons before stated, he requested him to say nothing about it to James Rice and never charged himself with the payment of that amount to him by the said Joseph Teas, or made any entry of it on the books of the firm, and of which other specific instances were thereafter stated.

That James Rice from time to time during the existence of the partnership last aforesaid was accustomed to advance and did advance to the firm upon their application and by way of loan for their accommodation, sums of money, and taking therefor the memorandum checks of the firm, and occasionally received from the firm payments on account of such loans and gave therefor his memorandum checks to the firm in order to preserve the dates of said payments for the calculation of interest thereon, and at certain times the said memorandum checks were intrusted to him to Achilles Hollingsworth in his capacity of bookkeeper and financial partner, to have the amounts due upon the same with the interest calculated and any amounts paid to him by the firm as aforesaid on account thereof deducted, and the balances thus ascertained were entered to the credit of his personal account on the books of the firm. That the last settlement of that nature appeared to have been made and entered on the said books in the year 1849, and that afterward during that year and until his retirement as aforesaid from the said firm in the year 1854, he continued to make such advances, receiving the checks of the firm therefor made and signed by Achilles Hollingsworth, and also receiving occasional payments on account thereof from the firm in like manner as aforesaid.

And that at the time of his said retirement from the firm the memorandum checks so received and held by him since the last

settlement of similar ones before stated were also intrusted by him to Achilles Hollingsworth for the like purpose as aforesaid, who after calculating the amount of said checks with the interest thereon and deducting therefrom the amount due from him for similar checks given by him for payments made to him on account of such loans by the said firm, he returned the firm's checks to him with a memorandum of the balance due him between the two sets of checks aforesaid, amounting to the sum of thirteen thousand five hundred and thirty-nine dollars and eighty-six cents, but that he knowingly and fraudulently omitted to make any entry of the said indebtedness, or of the receipts of the several sums of money for the loan of which the checks last aforesaid had been given upon the books of account of the said firm. That the said memorandum checks representing the amount so loaned by him to the firm, with the memorandum aforesaid, came into the possession of the complainant as his administrator, and that the said checks, being both of them in the handwriting of Achilles Hollingsworth, would naturally tend to produce and did produce the impression that the said checks had been settled; and it was not until the year 1869 upon accidentally acquiring possession of his memorandum checks drawn for payments made to him by the said firm as aforesaid during the period covered by the said checks of the said firm, and also upon obtaining an opportunity for the first time to inspect the books of the said firm, the complainant first discovered the fraud perpetrated upon him as aforesaid.

That at the time of his retirement as aforesaid there was due to him from the firm last aforesaid a large sum for castings furnished by him to the firm, and that Achilles Hollingsworth calculated the amount due on that account from the bills rendered by him, and after deducting therefrom the checks against him entered on his private account as distinguished from his company or stock account upon the books of the said firm, ascertained the balance due him on such private account and made and delivered to him the note of the said firm at six years for the balance ascertained, which was two thousand five hundred and ninety-six dollars and five cents, and which was in addition to the sum of thirteen thousand five hundred and thirty-nine

dollars and eighty-six cents therein before mentioned as the balance due him on the memorandum checks, and was also in addition to his partnership interest in the business of the said firm when the same should be thereafter settled up and ascertained; and that on or about the 19th day of November, 1869, the said Amor H. Harvey made a distinct acknowledgment to the effect that the balance in his favor between the checks drawn by the said firm and held by him, and the checks drawn by him and, held by the said firm and the said note of the said firm to him amounting to the respective sums before stated, were still subsisting demands against the said firm of Hollingsworth, Harvey & Co.

That Achilles Hollingsworth, while acting as bookkeeper for the firm last aforesaid, did from time to time, during the existence of the said firm, and also of the succeeding firm, knowingly and fraudulently make payments of his own separate and individual debts, and for his own use and benefit, out of the partnership funds by means of checks of the said firms drawn by him upon the funds of the same deposited in bank without ever charging himself with the amount of such checks, or making any entry thereof against himself upon books of the said firm or firms, or in any manner to account therefor, and that it was his habit as aforesaid to fraudulently appropriate the funds belonging to the said firm to his own use, whereby both James Rice and Amor H. Harvey, his copartners in it, were defrauded of large sums of money, and by reason whereof the funds of the said James Rice were so completely absorbed that the financial embarrassment both of the firm and himself led to his withdrawal from the firm, and a settlement of its indebtedness to him was rendered impossible by the said firm.

That Achilles Hollingsworth and Amor H. Harvey were each entitled, by an agreement of the partners, to a salary of four hundred and fifty dollars per year in consideration of their personal services, and to put them upon an equal footing with the other partner, James Rice, who was not expected to give, and did not give, his personal attention to the business of the firm; and that Achilles Hollingsworth had no other visible means of support than that which he derived from his business, and live_d

at an expense utterly unaccounted for by the amounts charged on the partnership books as drawn out by him, and, as appears from the books of the firm, he overdrew his accounts for a number of years and then ceased to post any personal accounts, and that he fraudulently expended large sums of money out of the partnership funds for his own use and benefit without ever, accounting therefor, of which alleged fraudulent transactions among many others so alleged, the following were specifically stated; that the following checks of the firm were paid by the bank and not entered upon the margin of the check-book or elsewhere in the books of the firm, and that the sums paid upon them were wholly unaccounted for, to wit:

Oct. 6th, 1848,	payable to William Bright for the sum of	\$80 00
April 14th, 1849,	" " " " "	20 00
" 22d, 1849,	" " " " "	150 00
October 19th, 1850,	" " " " "	250 00
" 20th, 1856,	payable to "shop" " "	10 00
" 24th, 1849,	" "selves" " "	940 00
" 30th, 1849,	" "shop" " "	12 00
November 5th, 1849,	" " " " "	456 35
" 8th,	" " " " "	50 00
" 21st,	" " "selves" " "	5 00
" 21st,	" " " " "	65 00
" 23d,	" " "shop" " "	5 00
" 29th,	" " " " "	70 00
" 24th,	" " "McFaddin" " "	346 20
" 24th,	" " "shop" " "	85 00
" 30th,	" " " " "	10 00
December 1st,	" " " " "	75 00

with many others of like character, extending over the entire time that James Rice was connected with the said firm and afterward, and all of which the complainant craved leave to exhibit at the hearing of the cause. And that there were many other payments so made by him of large and small sums of which there was no charge on the books other than a memorandum upon the margin of the check-book, as follows:

January 9th, 1851, to William Bright, for	\$50 00
December 8th, 1856, to Joel V. Greenman, for	13 13
November 18th, 1851, to William Bright, for	750 00
“ 24th, “ “ Joel V. Greenman, for	36 66

And that in many of the cases which had come to the knowledge of the complainant, he had fraudulently made payments as before stated out of the funds of the firm, but wholly for his own use and benefit, as in the following instances: He held a policy of insurance in the American Life Insurance Company, of Philadelphia, for the sum of one thousand dollars, dated November 6th, 1852, upon which there became due quarterly premium payments in the sum of eight dollars and fifty cents, and a second policy of insurance in the same company for two thousand dollars, dated October 6th, 1855, on which like quarterly payments became due in the sum of nineteen dollars and sixty cents, also a third policy of insurance in the Penn Mutual Life Insurance Company, of Philadelphia, for the sum of three thousand dollars, dated February 27th, 1851, upon which premium payments annually became due in the sum of fifty-four dollars and forty-five cents, and that he fraudulently drew from time to time as they became due the checks of the firm upon the funds of it deposited in bank for the amounts so payable upon the three policies of insurance aforesaid, in many instances making no charge or entry against himself for the sums so drawn upon the books of the said firm so kept by him as aforesaid, notwithstanding the said bank checks so drawn but not charged as aforesaid were duly paid out of the funds of the said firm.

As an example of the manner in which he kept the books and accounts of the said firm, and failed to execute the trust reposed in him by his partners, the cash transactions of a single month, that of November, 1849, was referred to and stated as follows:

On the first day that month the account of	
the said firm in bank was overdrawn	. \$363 10
Total amount of deposits and discounts	
credited to the said firm during the	
month, ...	\$4,399 52

Leaving cash to the credit of the firm in bank to be accounted for during the month, ...	\$4,036 42
To which must be added the amount overdrawn on the 6th of December following, ...	62 14
	4,098 56

The amount of cash credits on journal	
The same on petit cash-book	03-3,655 80
during the same month was	\$3,249 77

Which deducted from funds actually in bank left a balance totally unaccounted for which passed through his hands in one month of	442 77
--	--------

As appears from the above statement there were receipts actually deposited in bank during the said month to the amount of	\$4,399 52
---	------------

There were cash debits in journal only of	1,703 05
And on petit cash-book of	120 09-1,823 14

The total of which was less by the sum of than the receipts as per bank-book.	\$2,576 38
---	------------

That there were checks drawn but not charged or accounted for during said month amounting in the whole to the sum of	\$1,285 54
--	------------

The amount of cash deposited in bank being, as above stated, ...	\$4,399 52
--	------------

And the amount of cash debits accounting for cash received, ...	1,703 05
---	----------

Also a note discounted to pay old one charged the same day, ...	1,435 00-3,188 05-1,211 47
---	----------------------------

whereby there appeared a balance of cash received and unaccounted for tallying with the amount of checks drawn but not charged; and these statements fairly indicated by way of exam-

ple the manner in which he kept the books of the said firm, while they showed irregularities which would have been sufficient to reduce the most prosperous business to a state of great financial embarrassment, and an utter inability to discharge its just obligations, as was the fact in that case.

That James Rice died January 1st, 1861, intestate, and letters of administration on his estate were duly granted by the Register of Wills in and for New Castle County to John V. Rice, the complainant, on the 6th day of March, 1861. That during his last illness and while he was on his sick-bed he sent for Achilles Hollingsworth in order to see and converse with him on the subject of the unsettled accounts between the said firm and himself, but Amor H. Harvey visited him on his death-bed and to him he said: "I am afraid Achilles Hollingsworth has deceived me. I sent for him to give me some evidence of your indebtedness more tangible than that which I hold that I may leave to my creditors," who reported the same to him and which he received with great uneasiness of manner, but finally, and only after the said Harvey had told him that James Rice was too sick to talk about business, he consented with great reluctance to go, and did go to see him, but he was then too weak to converse with him.

The prayer of the bill was as follows: 1. That the defendants respectively may under oath or affirmation answer such interrogatories to this bill of complaint appended as they are severally required to answer. 2. That the defendant, Susan Z. Hollingsworth, may be decreed to hold the real estate mentioned and described in the foregoing bill of complaint in trust for and to the use of the members of the late firm of Hollingsworth, Harvey & Co., first aforesaid, and the representatives of any deceased partner or partners, pursuant to the agreement as stated in the said bill of complaint, under which the said real estate was purchased and conveyed to the said Achilles Hollingsworth; and further, that the said Susan Z. Hollingsworth may be decreed to account for any portions of said real estate which may have been sold, and the amount or amounts received in payment for the same by her, with interest thereon. 3. That the said real estate may be decreed to be sold by a trustee or trustees

appointed by this court for that purpose, that the said Susan Z. Hollingsworth may be decreed to convey the legal title to said real estate to such trustee or trustees, and that the proceeds of such sale first being paid into this court, such share thereof as the chancellor may ascertain to be due in equity and good conscience to your orator as administrator of the said James Rice may be decreed to be paid to your orator by a short day to be appointed for that purpose. 4. That an account may be taken of the whole amount which is due to the estate of the said James Rice for and on account of the amount of money advanced by him to the firm of Hollingsworth, Harvey & Co., last aforesaid, evidenced by the said memorandum checks, and of the amount of the private account of the said James Rice against the said firm for a part of which the said note was given, and also of the amount due to his estate on account of his interest as partner in the business of the firm last aforesaid, and also of the amount due to his estate up to the present time for his share of the rents and profits of said real estate as equitable tenant in common thereof, and that such sums so found to be due up to the present time, with interest thereon, together with his costs of this suit, may be decreed to be paid to your orator as administrator of James Rice out of the proceeds of the sale of the said partnership real estate, or out of any other property which may be found to be subject to the claim of your orator as hereinbefore stated. 5. That the claimant may have such other and further relief as the nature of the case may require.

By leave of the court, the bill of complaint was afterward amended as follows: That James Rice was naturally of a confident disposition and more subject to imposition than the generality of men had they been placed in his position; that the complainant never became aware that the real estate bought as aforesaid in the name of Achilles Hollingsworth was subject to any trust in favor of James Rice and his representatives until the year 1869, and it was only then discovered in consequence of his having an opportunity of examining the books of account of the firm of Hollingsworth, Harvey & Co., and thereafter through light thrown upon the subject during the course of a suit instituted by Amor H. Harvey in this court in relation to

the said real estate, and which had not yet terminated, that the complainant first became possessed of tangible evidence of the existence of such trust, the principal evidence of it having been until that year within the knowledge and possession of Amor H. Harvey, Achilles Hollingsworth, and his legal representatives. That the said real estate bought as aforesaid, but for which no deed appears of record as aforesaid, has been possessed by the first firm of Hollingsworth, Harvey & Co., by the second firm of that name, and by the legal representatives of Achilles Hollingsworth and their grantees, subject to the trust aforesaid, adversely to James Hollingsworth and Joseph Teas and the firm of Hollingsworth & Teas, and all others openly, notoriously, continuously, and peaceably for a period of more than twenty years; that at the time of the said withdrawal of James Rice from the said firm of Hollingsworth, Harvey & Co., it was fully understood and agreed between him on the one hand and Achilles Hollingsworth and Amor H. Harvey on the other, that he should give and the said firm should have six years' credit at least, not only on the note given as aforesaid at that time, but also upon all other indebtedness of the said firm to him.

Amor H. Harvey's was the first answer filed to the bill of complaint, and admitted that Jacob Pierson and Achilles Hollingsworth were partners in trade as machinists and blacksmiths in the city of Wilmington, under the name, firm, and style of Pierson & Hollingsworth, with a partnership capital of from three to four thousand dollars, in or about the year 1841, and he was admitted into the firm as an equal partner during that year, upon the payment of two thousand dollars to the firm, on which its name was changed to that of Pierson, Hollingsworth & Harvey, and in about one year afterward the said Pierson disposed of his entire interest in it to James Rice for about the sum of two thousand dollars, who thereby became entitled to an interest of one-third in the business of it, and as duly admitted and recognized as an equal partner of it, on which its name was changed to that of Hollingsworth, Harvey & Co. In the year 1849 there was in the same city a firm known as Hollingsworth & Teas, consisting of James Hollingsworth and Joseph Teas,

engaged in the business of heavy forging and boiler making; that the said firm were the owners of real estate in said city, situated between Front and Second Streets and between Poplar and Lombard Streets, and both James Hollingsworth and Joseph Teas owned other real estate in said city in their individual right and capacity; that the said firm in the year last mentioned were indebted to the firm of Hollingsworth, Harvey & Co. in the sum of about two thousand six hundred dollars, and were also indebted to the said James Rice, one of the members of the firm last mentioned, in his individual right upon two separate judgments, one being for the sum of one thousand two hundred dollars, and the other for the sum of one thousand five hundred dollars, both of which were liens on the real estate of the said firm of Hollingsworth & Teas, and also on the real estate owned by each of the members of it separately; that upon the said debt of two thousand six hundred dollars, owing to the firm of Hollingsworth, Harvey & Co., judgment had been obtained and entered of record, and which was also a lien on the said real estate owned by the firm of Hollingsworth & Teas, and on the said real estate owned by each of the members of it separately. There were also other and prior liens at that time existing against the said real estate of the said firm, and against the separate real estate of each of the members of it, amounting altogether to about ten thousand dollars.

In the years 1848 and 1849 legal proceedings were instituted and prosecuted against the said firm of Hollingsworth & Teas, and in pursuance thereof the real estate of the firm and the separate real estate of each of the members of it was condemned and advertised to be sold on execution process by the sheriff of the county on or about the 18th day of August, 1849. That previous to the sale a meeting of all the members of the firm of Hollingsworth, Harvey & Co. was held to take into consideration the interests of their firm in regard to it, and owing to the fact that besides the said liens of their firm and of the said James Rice against the said real estate so advertised to be sold, and the said liens which were prior to them, amounting to about ten thousand dollars in the aggregate, there were other and subsequent liens against it held by other parties, among whom was

the firm of Orrick & Campbell, of Philadelphia, of whom it was reported that they intended to make it sell for enough at the sale to pay all the prior liens and satisfy their claims against the firm of Hollingsworth & Teas, it was thereupon verbally agreed between all the members of the firm of Hollingsworth, Harvey & Co. that, as the said real estate of the firm of Hollingsworth & Teas, or a portion of it, could be made suitable for the purpose and business of their firm, that the said firm should either buy it or bid it up at the sale to a sufficient sum to cover the liens of their firm and the lien of the said James Rice for the said one thousand five hundred dollars against it, and Achilles Hollingsworth was authorized to carry out the agreement. That at the time of making the said agreement and up to the time of the said sale it was believed that the said firm of Orrick & Campbell would be bidders at said sale, and that the said judgment of James Rice for one thousand five hundred dollars against the said estate of Hollingsworth & Teas and against the real estate separately owned by each of the members of it, was included in the limit to which the said Achilles Hollingsworth was authorized to bid for said real estate, and was an inducement for and formed a basis of the agreement of the said firm of Hollingsworth, Harvey & Co. to purchase the real estate at said sale; but as it was bought in by the said firm at the said sale through the said Achilles Hollingsworth, in accordance with his instructions, at a much smaller sum than was required to cover the said liens of the firm of Hollingsworth, Harvey & Co. and the said lien of James Rice, this defendant cannot say of his own knowledge whether or not the said lien of James Rice for one thousand five hundred dollars was ever taken into consideration in the payment of the purchase-money for said real estate so sold by the sheriff and bought by the firm of Hollingsworth, Harvey & Co. as aforesaid, as no entry of such a transaction appears upon the books of the firm; though he has no reason to doubt, and it is his impression and belief, that it was, for the reason that neither this defendant, nor the said Achilles Hollingsworth, nor both of them together, were able or had the means to buy and hold the said property, or even to pay the ten per cent. required to be paid on the day of sale without the assistance of the said James Rice.

All the real estate of the said firm of Hollingsworth & Teas, and of the said James Hollingsworth and Joseph Teas, the members of it, was sold on or about the 18th day of August, 1849, by the sheriff and purchased by the firm of Hollingsworth, Harvey & Co., Achilles Hollingsworth, one of the members of the firm being the bidder in accordance with the instructions given him by the said firm for that purpose, all the members of it being present at the said sale; and that the purchase-money for the said premises so sold by the sheriff and bought as aforesaid was paid exclusively out of the funds of the said firm of Hollingsworth, Harvey & Co. as the same was required and demanded. That the legal title to all the property so purchased by the said firm was taken in the name of Achilles Hollingsworth, one of the members of it, at the request of and in accordance with the agreement between the members of it to that effect, because the firm expected to sell it or that portion of it not intended to be used by them for the purposes of their business, and in that case it would be less expensive and more convenient to have the title in the name of one than in the names of all the partners, and for the further reason that the firm was advised that it was not material whether it was taken in the name of the firm or in the name of but one of the partners, as the property had been bought on the partnership account, was to be used for partnership purposes, and formed a part of the partnership assets, and for the further reason that the said James Rice, one of the members of it, did not wish to have his name connected with the legal title to the said real estate, as he was actively engaged in the foundry business in another part of the city, and was not an active member of the said firm, and for the further reason that there were judgments existing both against this defendant and the said James Rice, so that if the title had been taken in the names of all the members of the firm there might have been some difficulty in conveying the said property if they should wish to sell it. That the said real estate of the firm of Hollingsworth & Teas, and of the members of it individually, so purchased as aforesaid by the firm of Hollingsworth, Harvey & Co., was not productive of any benefit to the said James Rice in any manner whatever except by reason of its

use by the firm of Hollingsworth, Harvey & Co. That a release was executed by the said firm some time after the purchase of the said real estate to the said Joseph Teas upon the consideration that it had got all the property there was, and did not wish to hold him liable of anything, more upon the judgments; but afterward, some time about the year 1860, the said Joseph Teas paid to Achilles Hollingsworth the sum of one thousand one hundred dollars on account of his indebtedness to the firm on the said judgments. This arrangement between Joseph Teas and Achilles Hollingsworth was effected, he is informed and believes, through the agency of Thomas Garrett, now deceased, for which sum Joseph Teas gave two notes, one for five hundred dollars and the other for six hundred dollars; the former was paid at maturity, but the other never was collected by Achilles Hollingsworth for the firm or accounted for by him, nor has the said note ever been found, nor has the said firm been in any way benefited thereby, so far as he has any knowledge of it.

There were upon the said real estate when so purchased aforesaid a one-story brick building about forty by ninety feet used as a forge shop, a one-story brick building ten or twelve feet square used as an office, and a one-story frame building thirty to forty feet square used as a boiler shop, and which, with the exception of the office building, were used by the said firm of Hollingsworth, Harvey & Co. in their business from the year 1850 until the death of Achilles Hollingsworth in the year 1865. There was also some machinery in the building at the same time which was unfit for the business of the said firm, including one steam engine and boiler, one steam engine, two steam boilers, one steam hammer, and one or more trip hammers, which were sold by the said firm to several persons the proceeds of which were received by the firm for and on account of the firm; and neither at the time of the sale thereof nor at any time thereafter was any claim made by the said Achilles Hollingsworth that the said machinery or the proceeds of the sale of it in anywise belonged to him solely or in his individual capacity. That during the time the said property was so held and occupied by the said firm, and before the with-

drawal of the said James Rice from the firm in the year 1854, the said buildings were repaired and greatly improved, the forge shop having a second story of brick built thereon, windows cut and put in, two floors added to make it suitable for a machine shop, and an office and fire-proof compartment made therein, while the frame building used as a boiler shop was turned around so as to front on the railroad and was otherwise greatly improved. The said firm also during that time erected on the said premises a one-story smith shop built of brick, measuring about twenty-three for forty feet, a new frame boiler house, and put therein a twenty-horse power engine and boiler and shafting, together with some additional stabling and shedding^h built thereon necessary for the business and purposes of the firm, and all of the expenses of which were paid out of the funds of the said firm exclusively. And furthermore, that all the repairs and improvements put on the said real estate were made by the firm of Hollingsworth, Harvey & Co., from the time it was so purchased by them as aforesaid in 1849, until the death of Achilles Hollingsworth in 1865, and that the expense of all such improvements and repairs was borne by the said firm, and all taxes and insurance on the said property were during the same time paid by the said firm out of the common funds of said firm, and by no other person or persons or in any other manner.

That the rents and profits of the said real estate, so far as they were due and as they became due, were received during the whole period before mentioned, sometimes by the defendant but more frequently by the said Achilles Hollingsworth, but when received by this defendant they were always handed over to him to be entered on the books of the firm, and since his death they have been received, as this defendant is informed and believes, by William G. Pennypacker, his executor, and one of the defendants in said bill of complaint. But he verily believes that the said rents and profits so collected and received for and on account of the said firm previous to his death were not duly and properly entered upon the books of the said firm and accredited thereto by him, whose duty it was as the bookkeeper and financial partner of said firm so to do, but were appropriated by him.

That there were on the said real estate two frame houses on the railroad and one frame house on Front Street, neither of which ever rented for less than five dollars per month, also one two-story house with back buildings on Second Street, which never rented for less than one hundred and fifty dollars per annum, and one three-story brick house on Third Street, which never rented for less than one hundred and twenty dollars per annum that there was no other property for which the firm received rent. This defendant is unable to state correctly the actual amount of rents received from the property, as no accurate account, he believes, has been kept of it in the books of the firm.

About the first part of the year 1854 the said James Rice became considerably involved financially in his own business as an iron-founder, owing largely to the fact that he had advanced at various times large sums of money to the said firm of Hollingsworth, Harvey & Co., and was not able to meet his payments, his principal creditor being his brother, John Rice; that the said firm of Hollingsworth, Harvey & Co. was indebted to the said James Rice in a considerable amount, which he desired should be paid to him, but which the said firm at that time was not able to do, and this defendant, at the repeated and urgent request of the said Achilles Hollingsworth, went on several occasions to him to persuade him to agree to quietly withdraw from the said firm, giving as the reason for it that if he remained in the firm holding its obligations for a considerable amount of money for money loaned by him to the firm, for castings furnished by him to it, and for his undivided interest in it, and his creditors should press for payment, the sacrifice would be so great as to ruin the said firm and would not benefit him, which, after much persuasion, he consented to do on condition that his brother, John Rice, would agree not to disturb his interest in the said firm until such time as the said firm should be in a condition to pay him the amount it owed him, and thereupon this defendant went to John Rice and persuaded him to assent to that condition, representing to him that the said firm then being in a prosperous condition, with its business constantly increasing, would eventually be able to pay James Rice all it owed him, and finding that

John Rice had assented to the condition, he withdrew from the said firm and was not after that time connected as a partner with it. And about that time, being in need of some money, the said firm gave him their note for two thousand five hundred dollars or thereabout, payable in five or six years, this defendant is not certain which, and he afterward told this defendant that he had lost it and requested him to get Achilles Hollingsworth to give him a duplicate of it to replace the lost note, but when he mentioned the matter to him he replied, "We have as many notes out now as we can meet the payment of," and he did not, as the defendant believes, ever give him the duplicate note of the firm for it, or pay him the amount of the lost note on account of the firm.

That there had never been to his knowledge, at any time before or since the withdrawal of James Rice from the said firm, any settlement between him and the firm or any member of it on behalf of the firm, and that during the lifetime of James Rice, who died in 1861, no settlement was ever made, because Achilles Hollingsworth always represented that the firm was not in a condition to pay him what it owed him, and after his death and during the lifetime of Achilles Hollingsworth similar representations were made by him to this defendant, and which were communicated by him to the said John V. Rice, administrator of the said James Rice and complainant in the said bill of complaint, so that no settlement was ever effected during the lifetime of Achilles Hollingsworth, but after his death, upon a request made to this defendant by the said John V. Rice, administrator of James Rice, for a settlement of the accounts of his father with the said firm, he referred him to the said William G. Pennypacker, the executor of the said Achilles Hollingsworth, who afterward informed this defendant, when conversing with him in regard to the matter, that he (this defendant) had no right to pay over any of the proceeds or effects of the said firm to the said John V. Rice, administrator of James Rice, because the claims of the said James Rice were barred by the statute of limitations. Achilles Hollingsworth died in the month of July, 1865. That he professed to be, and was believed by this defendant and the said James Rice to be, well acquainted with the science and practice of bookkeeping,

of which neither this defendant nor James Rice had any practical knowledge; and that James Rice was a man of very confiding disposition, and more liable to be imposed on for that reason, than men of business generally are, and that entire confidence was reposed in the said Achilles Hollingsworth in the management of the accounts and finances of the said firm, both by James Rice and this defendant. That the said real estate purchased by the said firm as aforesaid was always mentioned and spoken of by Achilles Hollingsworth, James Rice, and this defendant among themselves as "our property," meaning the property of their firm; that there had never been any other understanding with regard to it between or among the members of the firm, and that on two or more occasions, when this defendant had expressed his own dissatisfaction and that of his personal friends who had on his account indorsed the notes of the firm, at the small income derived from the business of it, the said Achilles Hollingsworth had replied that he should not be discouraged, for the increasing value of the real estate of the firm would be a sufficient compensation to the members of it.

And this defendant always believed that the said complainant knew that his father, James Rice, was entitled to an interest in the said real estate at the time of his death, and also in the business of the said firm up to the time of his withdrawal from it in 1854. That he came to him some time in the fall of 1869 and requested him to let him see the books of account of said firm then in his possession, which he cheerfully granted, and gave him every opportunity and facility for examining them, and that when he informed the said William G. Pennypacker of it he appeared to be very angry and said to him that "he had no business to let him have them," but the defendant had no knowledge that the said complainant had ever before had any opportunity of examining the said books of account.

That the said real estate so purchased as aforesaid continued in the possession of the first firm of Hollingsworth, Harvey & Co. and of the second firm of that name from the time of its purchase in 1849 until the death of the said Achilles Hollingsworth in 1865, and that during that time no disposition or sale had been made of any portion of it by the said firm either before or after

the said Jame Rice's withdrawal from it; that since the death of the said Achilles Hollingsworth it has been in the possession of his legal representatives and their grantees, and that since his death this defendant has not received any portion of the rents and profits of it, although he is entitled to one-third thereof, as are also the legal representatives of the said James Rice, as this defendant believes.

That the said James Rice frequently advanced money to the said firm of Hollingsworth, Harvey & Co. for the use of the said firm in its business, which loans were generally made by his giving the firm his checks, though sometimes he advanced the money in bank-notes or coin. That it was the custom of the firm thus to borrow money from him for the purposes of its business, and he would generally loan the firm money when thus called upon, and the defendant had known him to borrow money on his own account in order to lend it to the firm; and at the time of his withdrawal from it there was a considerable amount of money due to him from the firm for castings furnished by him, for money borrowed from him, and for his interest in said firm; and when the firm borrowed money from him it would on such occasions, but on no other, give him memorandum checks representing the indebtedness of the firm to him for the money so borrowed from him; and that the evidence of the indebtedness of the firm to him for his interest in it, and for the castings and materials furnished by him, should appear on the books of the firm, to which the defendant craves leave to refer when produced in court, and that the same when so produced may be taken as part of this his answer.

That this defendant on one occasion, the date of which he does not remember, acknowledge to the said complainant that the balance in favor of the said James Rice upon certain memorandum checks in the possession of the complainant, and also the amount of a note for about two thousand five hundred dollars, held and lost by James Rice, were subsisting demands against the said firm of Hollingsworth, Harvey & Co., and to the best of his knowledge and belief they are still subsisting demands against the said firm.

That both this defendant and Achilles Hollingsworth received

a salary of four hundred and fifty dollars per annum in consideration of their personal services as active members of the said firm, he, the said defendant, having charge of the shops and mechanical part of the business, and the said Achilles Hollingsworth having charge of the books, accounts, and finances of said firm; that the said James Rice, not being an active partner in it or giving his personal attention to the business of it, never received any salary or compensation other than that which he derived from the business of the firm; and this was established and agreed upon between them when the said James Rice was admitted into the firm.

That the said Achilles Hollingsworth at no time during the existence of the said firm, either before or after James Rice's admission into it or his withdrawal from it, had any visible means of support for himself and family, except that which he derived from his connection with said firm and the salary fixed by law, which he was entitled to receive for some time during that period as a member of the City Council of Wilmington; and he had repeatedly declared to this defendant that he was entirely dependent on his salary as a member and his share in the profits of the business of the firm for his support.

That during the last illness of the said James Rice, in the latter part of the year 1860, this defendant visited him frequently, and on several of his visits he requested him to ask Achilles Hollingsworth to call and see him, as he wished to consult with him in relation to the unsettled accounts between himself and the said firm, and during said visits had expressed himself to him in this manner, viz.: "I am afraid Achilles Hollingsworth has deceived me. Have I not sent for him to give me some evidence of your indebtedness (meaning the indebtedness of the said firm) more tangible than I now hold, which I may leave to my family and creditors?" and which requests and also remarks made by him he had communicated to him, but he always gave some evasive answer to such requests. That upon the occasion of his last visit to him, a day or two before his death, he remarked to this defendant in answer to some inquiry of his, "I have now given up all worldly business," and on his return from the visit Achilles Hollingsworth

inquired of him how he was, and when he informed him that he had then given up all worldly affairs, he seemed confused, and putting on his coat said he must go and visit him, which he then did, as this defendant is informed and believes, but he does not know whether he was admitted to the sick-chamber or not; of this, however, he is certain that the said James Rice was then too low to consult with him upon his business affairs and had given up all attention to worldly business.

The joint and several answer of William G. Pennypacker and Susan Z. Hollingsworth, the other defendants, admitted that in the year 1841 Jacob Pierson and Achilles Hollingsworth were partners in trade as machinists in the city of Wilmington under the name of Pierson & Hollingsworth, but they did not know whether the joint capital of the firm was or was not about four thousand dollars; that during that year the defendant, Amor H. Harvey, was admitted into partnership in the business with them, and that the new firm was then and thereafter known under the name and style of Pierson, Hollingsworth & Harvey. They admitted that he furnished or contributed at different times an aggregate sum of two thousand dollars or its equivalent toward the capital of the said firm, but denied that he contributed an equal share of capital with the other members respectively, and alleged that an inventory taken on or about the first day of February, 1841, of the tools, fixtures, stock on hand, and work in progress belonging to the said firm of Pierson & Hollingsworth by weight and estimate, and that the said inventory and appraisement of the goods and chattels therein contained amounted to the sum of nine thousand and sixty-nine dollars and ninety-five cents; that on the same day an inventory of the stock belonging to the said Amor H. Harvey, and then about to be contributed by him toward the capital of said firm, was taken, and that the same amounted by estimate and appraisement to one hundred and fifty dollars, amounting in all to nine thousand two hundred and nineteen dollars and ninety-five cents, and that the said Jacob Pierson, Achilles Hollingsworth, and Amor H. Harvey certified the same over their own proper handwriting to be satisfactory to them, and on the same day mutually agreed to put the foregoing inventory in joint stock

under the name of Pierson, Hollingsworth & Harvey, and that they were not aware of any other sum of money except cash at various times to the amount of one thousand eight hundred and fifty dollars, or contribution put in or made to the capital of the said firm by the said Amor H. Harvey to make his share equal to that of the other members respectively.

The said defendants also admitted that said Jacob Pierson on or about the 22d day of January, 1842, withdrew from the said firm, then selling his entire share and rights therein to the said James Rice, and that he was thereupon admitted into partnership with the said Hollingsworth and Harvey in the said business, and that the new and last firm was then and thereafter known under the name and style of Hollingsworth, Harvey & Co., but they did not know what was the consideration paid by him for the interest of the said Pierson, or whether the said three persons composing the said last-mentioned firm were or were not equal partners. They also further admitted that James Hollingsworth and Joseph Teas, in the year 1849, and for some time prior thereto, were partners in the said city as machinists and blacksmiths under the name and firm of Hollingsworth & Teas, and as such partners held and owned certain real estate in said city, and held and owned individually certain other real estate in it, and that the said firm was then the debtor of the said firm of Hollingsworth, Harvey & Co., in a certain judgment in the Superior Court at New Castle, being No. 424, to November term, 1847, in the real debt of two thousand six hundred and fifty dollars, and was also the debtor of the said James Rice in his individual capacity in two judgments in the said court, to wit, No. 425, to November term, 1847, for the real debt of one thousand five hundred dollars, and No. 232, to November term, 1848, for the real debt of one thousand two hundred dollars, but all of them were subordinate to other and prior liens against the real estate of the said firm of Hollingsworth & Teas and the real estate owned by the members of it individually and separately, amounting in the aggregate to about ten thousand dollars; also that the real estate of the said James Hollingsworth was in 1848 and 1849 subject to a first mortgage made by him and his wife to the

Wilmington Savings Fund Society to secure a debt of two thousand six hundred dollars, and that a judgment upon it was obtained in said court, being No. 185, to the May term, 1849, and a writ of *levari facias*, being No. 47, to November term, 1849, directed to Isaac Brubb, then sheriff of the county, was issued upon it to sell the real estate described in the said mortgage; and that by virtue of a writ of *fieri facias*, being No. 17, to May term, 1849, and of a writ of *venditioni exponas*, being No. 31 to November term, 1849, issued out of said court upon the said judgment of *James Rice v. Hollingsworth & Teas* for one thousand two hundred dollars, the lands of the said firm of Hollingsworth & Teas, and of the said James Hollingsworth and Joseph Teas, owned by each of them separately, were levied upon, condemned, and advertised for sale by the said sheriff. But they expressly and positively denied that during the time of the said legal proceedings, or at any other time, it was agreed by and between the members of the said firm of Hollingsworth, Harvey & Co., and by that firm determined, either to purchase the real estate of the firm of Hollingsworth & Teas and of James Hollingsworth and Joseph Teas, or to bid it up at the said sale so that the proceeds of it would cover the indebtedness of the said firm of Hollingsworth & Teas, both to the firm of Hollingsworth, Harvey & Co. and to James Rice, or any other agreement with reference to the purchasing of said lands. They also expressly and positively denied that the firm of Hollingsworth, Harvey & Co. at or about the time of such sale had any intention of making such purchase or bid, or that the object of any purchase which might be made by the said firm was to recover the amount of the said firm's claim and of James Rice's claim of one thousand five hundred dollars, against the said firm of Hollingsworth & Teas, either by a speedy sale of said real estate or by retaining and using it as partnership property, or that the said one thousand five hundred dollar claim of James Rice entered into the consideration of the firm of Hollingsworth, Harvey & Co., or that the said firm looked upon it in the same manner as if it were their claim; or that James Rice suggested that the title to the said real estate should be taken in the name of Achilles Hollingsworth; or that he

stated that it did not matter in whose name the deed should be drawn, inasmuch as Achilles Hollingsworth was to keep an accurate account of all moneys paid for and received from said property; or that, in pursuance of any such suggestion or of any suggestion, Achilles Hollingsworth was authorized by the firm of Hollingsworth, Harvey & Co. to attend the sale of said real estate, and to buy the same if the proceeds of the sale of it should not be sufficient to cover the said judgments of the said firm of Hollingsworth, Harvey & Co. and James Rice on account, on behalf, and for the use of the said firm, and to take the legal title in his own name.

The defendants further admitted that all of the said real estate of the firm of Hollingsworth & Teas and of James Hollingsworth and Joseph Teas in said city was sold at sheriff's sale by said sheriff on the 18th day of August, 1849, the said real estate of James Hollingsworth covered by the said mortgage for four thousand dollars, and all the rest of the said real estate of the said James Hollingsworth, together with all the said real estate of the firm of Hollingsworth & Teas and of Joseph Teas, for six thousand and forty dollars. And that the said Achilles Hollingsworth attended the said sale and bought all the said real estate of the firm of Hollingsworth & Teas and James Hollingsworth and Joseph Teas, but they expressly and positively denied that he attended it or made such purchase in pursuance of any agreement or determination of the firm of Hollingsworth, Harvey & Co., or of any authority given to him by said firm for that purpose. They did not know whether the other two partners of said firm attended the said sale or not, and they did not admit that the said real estate was correctly described in the bill of complaint, but refer to the writs issued as aforesaid for the true descriptions of it. They also expressly and positively denied that the said firm of Hollingsworth, Harvey & Co., by and through Achilles Hollingsworth, or by and through him only as the agent of said firm, bought all or any of the said real estate at said sale for the use and benefit of the said firm, and for no other purpose or purposes; but on the contrary they alleged that the said purchase was made by him on his own individual account in his own name

and for his own benefit, irrespective of the said firm, and that the same was so held by him from the time he so purchased it until his death. That the said sheriff by deed-poll dated December the 28th, 1849, conveyed to the said Achilles Hollingsworth in fee simple all of the said real estate of James Hollingsworth and wife sold by him on the day and year aforesaid under the said writ of *levari facias*, and for the said real estate of the firm of Hollingsworth & Teas, and James Hollingsworth and Joseph Teas, sold by him under the said writ of *venditioni exponas*, the said sheriff delivered to the said Achilles Hollingsworth a deed bearing date December the 28th, 1849, conveying the said real estate to him in fee simple, the records of which were duly referred to, etc. They had no knowledge whether the said Achilles Hollingsworth paid any sum for the consideration mentioned in the deeds of James Hollingsworth and wife dated August 28th, 1848, and of Joseph Teas and wife dated October 23d, 1849, or whether the same were executed for the sole purpose of barring any contingent right of dower in the said real estate.

They also expressly and positively denied that the purchase-money paid for the said real estate came wholly and directly from the partnership funds of the said firm of Hollingsworth, Harvey & Co., and alleged that the same came from the individual funds of the said Achilles Hollingsworth, and on his own account in the manner thereafter set forth, that is to say, the first payment of one thousand and eighty-three dollars and thirty-eight cents made by him for the said real estate was made with the check of the said firm, but they (the defendants) alleged that the amount thereof was charged by the said firm against him and was repaid in full with interest to the said firm by him, and they expressly and positively denied that all or most or any of the subsequent payments for said real estate were derived from the partnership funds of the said firm, but alleged that the same were made by him with his own individual funds; and that at the said sheriff's sale he bought a portion of said real estate, to wit: Tract No. 2, described in the said writ of *venditioni exponas*, being a lot of ground with the house thereon erected, and took the title thereto from the said

sheriff in pursuance of said sale under and subject to a mortgage executed by Joseph Teas and wife to the Wilmington Fire Insurance Company for six hundred dollars, bearing date August 5th, 1846, and that the same was part of the consideration-money for said premises, and that these defendants have since the death of Achilles Hollingsworth paid the amount thereof out of his estate, and that on or about the 19th day of December, 1870, the said Susan Z. Hollingsworth sold and conveyed said Tract No. 2 to Jacob Reynolds, but the said premises were not adjacent to or connected with the remainder of the real estate purchased at said sheriff's sale, and were not used by said firm or claimed as partnership property.

And the defendants further alleged the said Achilles Hollingsworth, after purchasing the said real estate at sheriff's sale as aforesaid, for the purpose of raising the necessary funds to pay the balance of the purchase-money of ten thousand and forty dollars, left after deducting the sum of one thousand and four dollars, it being the amount of the ten per cent. of the purchase-money paid to the said sheriff on the day of sale out of said one thousand and eighty-three dollars and thirty-eight cents, negotiated certain loans, and immediately after receiving the deed of said Isaac Grubb, sheriff, as aforesaid, to wit, on the 28th day of December, 1849, executed mortgages upon the said real estate to secure said loans as follows:

1. To the Wilmington Savings Funds Society, dated December 28th, 1849, for	\$ 2,400 00
2. To Ann Billany (same date) for	700 00
3. To The Delaware Fire Insurance Company (same date) for	450 00
4. To The Farmers' Bank (same date) for	2,100 00
5. To McDaniel & Harvey (same date) for	1,800 00
And also his judgment bond to John Rice (same date) on which judgment was entered for	1,595 64
Add the ten per cent. above named, ...	1,004 00

Making the total sum of \$10,049 64

That the said mortgages were executed by the said Achilles Hol-

lingsworth and Susan Z. Hollingsworth, his wife (one of the defendants), to the said parties respectively, in pursuance of arrangement made by him with them that the several amounts thereof which had been previously loaned to James Hollingsworth or to Hollingsworth & Teas, and were to be paid off with the proceeds of the said sheriff's sale, should be loaned to the said Achilles Hollingsworth, and that he was thus enabled to make up without any aid from the said firm of Hollingsworth, Harvey & Co., beyond the loan of the ten per cent. of the purchase-money as aforesaid, the full amount of said purchase-money (ten thousand and forty dollars), and that Achilles Hollingsworth at the same time, with the full knowledge of the said Amor H. Harvey and James Rice, effected an insurance in his own name upon the said premises, and gave his individual deposit note therefor and paid the premium thereon, and that he paid during his lifetime the interest on the said loans, and also the principal of the said

Mortgage of	\$ 700 00
And on account of the principal of said mortgage of \$1,800, the sum of	800 00
And the said judgment of	1,595 64
	\$3,095 64

And that these defendants have paid since his death the interest on the unsatisfied mortgages aforesaid, and also the principal of said

Mortgage of	\$ 450 00
And on account of the principal of the said mortgage of \$2,100, the sum of	500 00
And the balance due on said mortgage of \$1,800, ...	1,000 00
	\$1,950 00

And that the remainder or balance due on the said liens was still a claim against the estate of the said Achilles Hollingsworth, and amounted to the sum of four thousand dollars, and that neither the said James Rice nor his representatives nor the said Amor H. Harvey was or were in any way responsible therefor or connected therewith. That no part of the principal or

interest of said loans was paid or contributed by the firm of Hollingsworth, Harvey & Co., or the said James Rice or Amor H. Harvey, but that the same had been paid out of the sole, separate, and individual property of the said Achilles Hollingsworth.

And the said defendants expressly and positively denied that the said real estate was so purchased in pursuance of any such agreement as is alleged in said bill of complaint, or for the uses therein alleged, in order to cover the judgment of the said firm of Hollingsworth, Harvey & Co. for two thousand six hundred dollars, and of James Rice upon one or both of his said two judgments, or for the reason that in view of its availability for the purpose of the business of the said firm and the existence of the said liens, apart from any other considerations, the said real estate was worth more to the said firm than the price at which it was struck off at the said sheriff's sale; and they also denied that the said judgments did, either in fact or in law, form any part or portion of the consideration or inducement upon which the said real estate was bought by said Achilles Hollingsworth, or that the said judgments of the said firm and James Rice furnished the basis of any claim whatsoever in law or equity on the part of the said firm or of the said James Rice to the said real estate.

They also alleged with reference and in answer to the claim set up in the bill of complaint by the administrator of James Rice, deceased, to a share or interest in the said real estate, that no agreement in writing concerning the said lands or any part thereof, or any interest therein, nor any note or memorandum thereof in writing, had been or was made or signed by the said Achilles Hollingsworth, or by any person thereunto lawfully authorized by him, and they claimed the benefit of the statute for the prevention of frauds and perjuries in the same manner as if they had pleaded or demurred to the complainant's bill of complaint.

They also denied that any release was given by the said firm of Hollingsworth, Harvey & Co. to Joseph Teas from his legal liabilities to them on the said judgments in accordance with any supposition that the said purchase of the said real estate was

based in part upon the consideration of the said judgments, were held as liens upon it by the said firm or James Rice, or that any expressions were made by the said firm at the time of executing said release that they had gotten all there was of the property and did not wish to hold him subject to the said judgments, or that any such expressions, if made at all, were made because of any ownership or interest, actual or implied, by the said firm or by Amor H. Harvey or James Rice in the said real estate. They were not aware of any release executed by the said firm to Joseph Teas, but they had been informed that a portion of the judgment against him had been paid to them after the date of the said sheriff's sale. They, however, did not know the time when or the circumstances under which the payment was made or the amount of it. And further, that they were informed and believed that upon the said real estate so purchased by the said Achilles Hollingsworth there were at the time of said purchase buildings and other structures which the firm of Hollingsworth & Teas had used in their said business which could, with alterations, be made suitable and convenient for the business of the firm of Hollingsworth, Harvey & Co. as at that time conducted. They also admitted that after its purchase by the said Achilles Hollingsworth the said real estate was enlarged, improved, and repaired, but they denied that it was done at the joint and common expense of the said firm of Hollingsworth, Harvey & Co., or in any other manner that would entitle the said complainant to any share or part thereof. They alleged that the agreement and understanding between the said Achilles Hollingsworth and the said James Rice and Amor H. Harvey was substantially as follows: At the time of the purchase of the said real estate as aforesaid, two engines and boilers and a trip hammer and all fixtures and machinery upon it passed as part thereof to the said Achilles Hollingsworth, the purchaser. At the request of the said firm, and upon their representation that the said engines and boilers were too large for the purposes of the firm, they and the trip hammer were sold, the said firm having agreed to put in, which they did, a smaller engine and boilers, and also having agreed with him to expend upon the said real estate in putting another

story on the shop and in otherwise improving it an amount equal in value to the amount of the sales of the said engines, boilers, and trip hammer. In making that improvement the firm charged him in his real estate account with all the brick and other material used in all the work and labor done upon the building, and erroneously credited the receipts from the sales of the said engines, boilers, and trip hammer to shop account instead of to him, the said Achilles Hollingsworth, without replacing them with machinery of equal value according to the said agreement. And they further alleged that the amount of the said sales greatly exceeded the amount expended for said improvements, and that Achilles Hollingsworth afterward applied to the other members of the said firm to make up the difference by putting in a Dimpfel boiler, which they agreed to do, and such a boiler was built by the said firm, but owing to the embarrassed state of the firm's finances and because they had an opportunity of selling it to advantage, it was sold by and on account of the firm, and an old steamboat boiler was put in instead of a new boiler.

The defendants also further alleged that Achilles Hollingsworth at the time of the purchase of the said real estate, and at all times thereafter up to the time of his death, asserted a claim to it as his individual property, and constantly set up the claim that he had purchased the same for his own use and profit, and did during his lifetime claim, charge, and receive rents for the said premises; that neither of the other partners of the said firm of Hollingsworth, Harvey & Co. during his lifetime set up any claim or right to the same, or claimed that the same was the property of the said firm; that they acquiesced, agreed, and asserted during a period of many years and up to the time of his death that the same was his individual property; that they were cognizant of and assented to the payment of rents for said premises to him, and that the said rents were claimed by and paid to him for his own separate and individual use with their knowledge and consent, and without any claim on their part that the said rents belonged to the said firm or that the other members of it had any joint interest therein or title thereto; that a part of them was paid to him through Amor H.

Harvey, and that the said Harvey repeatedly received said rent as his agent, and afterward paid the same over to him as his individual property without any claim that either he, James Rice, or the said firm had any interest therein or right or title thereto. And they further alleged that at no time within twenty years after the purchase of the said real estate did James Rice or his representatives or Amor H. Harvey intimate, pretend, or claim that he or they had any right, title, or interest in the said real estate, or that the same was held in trust by Achilles Hollingsworth for the said firm, or that the firm possessed or used the same for the purposes of their business in any other manner than as tenants of Achilles Hollingsworth, the owner thereof. And they denied that all payments for taxes, insurance, and other expenses incident to the ownership of said real estate were wholly made by the said firm out of their own funds and for their own benefit. They admitted that the rents and profits of said real estate not in actual use by the said firm were collected by him, but denied that he collected them by the permission of or for the said firm or as partner having charge of its finances; or that the other members of the firm supposed that they were entered in the books of account of or otherwise accounted for to the firm; or that there was any understanding among the members of the firm that he should keep any account of the receipts and expenditures on account of said real estate; and they alleged that in appropriating said rents to his own use he committed no fraud and violated no trust, but acted lawfully and honestly in all respects as he had a right to do with reference to his own estate, and which the other members of the firm had no right to control or dispose of in any way. They also admitted that up to the time of his death on the 12th day of July, 1865, he received the rents and profits of said real estate, but they were not informed of the amounts of them except as they stood to his credit on the books of the said firm when received for him by the firm and used by it; and that by his last will and testament he devised and bequeathed all his real and personal estate after the payment of his debts to Susan Z. Hollingsworth, his wife, one of the defendants, in fee, and appointed William G. Pennypacker, another of the defendants,

his executor, which after his death was duly probated and letters testamentary were thereon granted to the said executor, and that by virtue of said last will and testament the title to the said real estate vested in her, and that since his death all the rents and profits of said real estate had been received and appropriated by her and the said executor; and insisting and protesting that they could not be legally called upon to answer what was the amount of the said rents and profits received by them or by the said Achilles Hollingsworth, nevertheless they were willing to state the amount thereof so far as the same was known to them. The amount received by them since his death was about twelve thousand two hundred and fifty dollars, out of which the said Susan Z. Hollingsworth had paid taxes, insurance, repairs, and expenses on and connected with the said real estate. But they utterly and positively denied that the said Achilles Hollingsworth was guilty of many and gross irregularities or of any irregularities in keeping the accounts of the transactions of the said firm.

They also admitted, according to the best of their information, that about the beginning of the year 1854 the firm of Hollingsworth, Harvey & Co. was laboring under considerable financial pressure, and that James Rice was individually laboring under great pecuniary embarrassment, but they expressly denied that his embarrassment was owing to cash advances made by him from time to time to the said firm for use in its business. And they further denied that Achilles Hollingsworth requested Amor H. Harvey to say to James Rice that if he would quietly withdraw from the said firm it could or would in time pay him in full, and so enable him to pay his creditors, but if he remained in the firm holding so many of its obligations, consisting of memorandum checks for individual money loaned to it and for open company and private accounts, his creditors would force the firm into liquidation, and there would be such a sacrifice of its property as would ruin the firm. They denied that James Rice retired from the firm at the request of Achilles Hollingsworth, or that at the time of his withdrawal from it he held any claims, memorandum checks, or amounts against it which were not finally and fully settled to him by the firm at the time of his with-

drawal from it; and they alleged that such a full and final settlement was made by the said firm to him at and upon his withdrawal for all loans which had been made by him to the firm, for his private and company accounts, for his bill for castings, and his claims of all kinds, and for his interest in the property and business of the firm. They denied that it obtained after his withdrawal any general extension of time from its creditors, though it was probable and they were willing to admit that some of its creditors did grant a temporary indulgence and forbearance of their demands; and they further alleged that there was no reason at the time of his withdrawal why a full settlement should not have been made between him and the other members of the firm, and it was not postponed because of any indebtedness of the firm to him, either for moneys advanced by him or for his interest as a copartner, but in fact, a full and final settlement was made and evidences of indebtedness were given to him for the full amount due him on all accounts, which evidences of indebtedness were either paid or were allowed by him to be barred by the statute of limitations prior to his death, which took place about January 1st, 1861. That long prior to the institution of said suit the complainant had full access to and control over all the books, papers, and accounts of the said firm, and had fully examined them, had aided Amor H. Harvey in the preparation and prosecution of his suit and acted as his agent with reference to the said books, papers, and accounts in his possession for a long space of time, had made many pencil entries therein, and especially in the real estate account, and that he had sought to give testimony in the said cause to show that as early as the year 1864 he knew that a part of the purchase-money of the said real estate or a judgment given by Achilles Hollingsworth to John Rice for a part thereof had been paid by the said firm of Hollingsworth, Harvey & Co. in a note dated in 1861, and that whatever evidence was supposed to exist and show that Achilles Hollingsworth held said real estate in trust for said firm was in the possession of and known to the complainant long before 1869, and might have been known to him on inquiry and ordinary diligence upon his appointment as administrator of James Rice in March, 1861

The defendants also admitted that Achilles Hollingsworth was a practical bookkeeper well versed in the science of book-keeping, and for that reason that he had the management of the finances and the general care of the books of the said firm, but they alleged that James Rice and Amor H. Harvey always had free access to said books and accounts, were cognizant of what they contained, frequently examined and consulted them, and fully understood and assented to the entries made therein; that both of them had and exerted an equal control with Achilles Hollingsworth over the affairs of the firm, and well knew all that took place with reference thereto, were daily and constantly present at the shops of it and took an active interest in its affairs and work. And that Achilles Hollingsworth did honestly and truly execute and perform all the trusts reposed in him by the said parties, and did keep the books and accounts and financial matters of said firm with more than usual diligence and accuracy and in perfect good faith and integrity. They also denied especially and positively that he was guilty of or had committed any act of fraud whatever against his partners in the said firm. And they denied that James Rice was more subject to imposition or confiding in his disposition than the generality of men, but admitted that he was during the time of his connection with the said firm also engaged in carrying on the foundry business on his own account, and alleged that he was a man of fair business abilities and knowledge, and by no means weak in mind or ignorant or yielding of his rights. They believed and admitted that he was accustomed to advance to the firm sums of money by way of loan, and also to indorse accommodation notes for it, and they alleged that the firm was accustomed to advance sums of money to him by way of loan, and did also from time to time repay to him the amounts so loaned by him, and did fully repay and extinguish all and every memorandum check taken for such loans.

And they denied that Achilles Hollingsworth knowingly and fraudulently omitted to make entry of any indebtedness to James Rice, or of the receipt of any sums of money for which any memorandum checks were given, or that any reason existed why upon the application of the complainant, or upon his making

inquiry and using ordinary diligence, he might not have had a full opportunity of inspecting the books of the said firm at any reasonable time or times since he became the administrator of James Rice, or that there was any error in the settlement made with James Rice, or that at the time of his withdrawal from the firm there was any credit given for any indebtedness, or that any indebtedness existed except for the note of two thousand five hundred and ninety-seven dollars and five cents, which was given to him by the firm in settlement of all sums due him; or that they were bound by any acknowledgment which might have been made by Amor H. Harvey at any time of any note, debt, or balance as a subsisting demand against the said firm in favor of James Rice or his representative; or that Achilles Hollingsworth at any time or in any manner, knowingly or fraudulently, made payments of his own individual debts, and for his own use and benefit, out of the funds of the said partnership, or did fraudulently omit to make any entry or charge of the same against himself on the books of the said firm, or to account for the same, or did fraudulently appropriate the funds belonging to said firm to his own personal use, or that James Rice or Amor H. Harvey were defrauded in any way by him of any sum of money, or that the funds of James Rice were absorbed, or his withdrawal from the firm was occasioned, or any settlement with him was rendered impossible, by or through any fraud of Achilles Hollingsworth, or that there was any agreement that he and Amor H. Harvey should each receive a salary of four hundred and fifty dollars per year in consideration of their personal services and attention to the business of the firm, and to put them on an equal footing with James Rice, except for a period of one or two years immediately after he became a partner in it, and for which they received credit, but that the agreement was that as James Rice could not give his personal attention to the business of it, being engaged in the foundry business on his own individual account, Jarrett Magaw should be employed and paid by him to perform his duties and services in the firm, and he engaged him for that purpose and agreed to pay him for his services, but he failed and neglected to pay him through many years, and the firm paid him,

and the sums so paid him by the firm were properly chargeable against James Rice and were never paid by him; or that Achilles Hollingsworth did, from time to time, or at any time, fraudulently draw checks of the firm upon its funds and make no charge or entry against himself for the sums so drawn; or that any irregularities were committed by him which in any way tended to injure the firm, or produce financial embarrassment, on the contrary, they averred that the success which was finally achieved by the firm after James Rice withdrew from it was almost entirely owing to the financial and business arrangements and management of Achilles Hollingsworth.

They further alleged that he had other visible means of support than that which he derived from the said business, and denied that he lived at an expense unaccounted for by the amounts charged on the partnership books as drawn out by him, or that he overdraw his accounts for a number of years and then ceased to post any personal accounts, or that he drew as much from said firm as Amor H. Harvey drew. That James Rice, during all his business relations with Achilles Hollingsworth, and up to the time of the former's death, had the warmest friendship for and unbroken confidence in him; that he frequently called on James Rice in his last illness and while he was able to converse about business, and that there was no application made to him by James Rice or anybody for him, and no necessity for any such application, to give any evidence of indebtedness to him; and they expressly denied each and all of the statements to the contrary in the bill of complaint on the authority of Amor H. Harvey; and that the bill of complaint filed in the cause and claims therein made and the suit was prosecuted at the instigation of Amor H. Harvey, one of the defendants, and partly for his own pecuniary benefit; and that the said complainant and Amor H. Harvey had combined and conspired together for the purpose of establishing the said claim after the death of Achilles Hollingsworth and against his estate. And they craved leave to refer to the allegations and prayers contained in a bill of complaint theretofore filed in the court by the said Amor H. Harvey against these defendants, and in which the court had decided that so far as the interest

claimed by him in the said real estate was concerned that he had no such right, and that the said real estate was not subject to any trust whatever for the said firm of Hollingsworth, Harvey & Co. (of which James Rice was a member), but that the same was the sole and individual property of Achilles Hollingsworth in his lifetime, and of his devisee, Susan Z. Hollingsworth, since his death. And with reference to the claims set up in said bill of complaint to a share or interest in said real estate, the defendant alleged that the same were barred by the statute of limitations, for the reason that no such claims were set up or made within twenty years from the time the said real estate was duly and legally conveyed to and came into the actual possession of Achilles Hollingsworth.

And with reference to the claims set up in said bill for an account, or for the repayment of any sums of money loaned to the said firm by James Rice as therein alleged, or for any other cause therein stated, the defendants said that the complainant had had a full and complete remedy at law, and that the causes of action and matters there stated arose and accrued more than six years before the bill was filed or they, the defendants, were served with process, and they claimed the benefit of the statutes for the limitation of actions and suits at law in bar of the complainant's demands, with the same effect as if they had pleaded or demurred to the bill of complaint.

And lastly they denied all matters alleged in the bill of complaint which had not been therein expressly answered.

The testimony for the complainant filled a good-sized pamphlet in small type of one hundred and thirty-two printed pages, and that for the defendants against whom only relief was prayed a similar pamphlet of seventy-six printed pages, while the brief of argument of the counsel for the appellant in this court filled a similar pamphlet of eighty-one printed pages, and that of the counsel for the appellees, the defendants below, above referred to, filled another of one hundred and ninety-one printed pages. The reporter has therefor not attempted to compress a statement of either the evidence or the argument in the case within such limits as would be reasonable in any one volume of our law reports of six hundred printed pages, and which he is conscious could

not be done with proper fidelity to either, if such a condensation were attempted in the report of them as a constituent portion of the case. As, however, all the essential evidence and principles of law and equity involved and discussed and on which it was decided by the court hereafter sufficiently appear in the written opinions of the judges with which the report of the case closes, he feels satisfied that the omission is allowable under the circumstances.

Houston, J., delivered the opinion of a majority of the court: The first matter we deem it proper to consider and dispose of in this case was the question raised as to the competency of Amor H. Harvey, one of the respondents, to testify as a witness for the complainant, and whose deposition and testimony the chancellor ruled out on the hearing of the case below, upon the grounds stated in his opinion, and in which we concur, with the additional reason for it, that notwithstanding he was a joint defendant in the suit, he was legally interested in the success of the complainant in it, and would gain by it because as only a year or two before this suit was instituted he had filed a similar bill as the surviving partner of the firm of Hollingsworth, Harvey & Co. against his present co-defendants, as the executor and devisee of his former and deceased partner, Achilles Hollingsworth, in which he alleged and relied on the same resulting trust in relation to the same real estate now in controversy in this suit, for the benefit of the late firm above mentioned, which is now alleged and relied on by the complainant in this case; and although the decree of the chancellor had been rendered and entered against his bill in that case and against such a trust, he was nevertheless directly interestd in having it established in this case, inasmuch as two years had not elapsed after the signing of the said decree, and his right of appeal from it therefore had not been barred by the statute of limitations at the time when he was examined as a witness in this case.

It was contended by the counsel for the appellant that the ruling of the chancellor on that point was erroneous, and we were referred to both the forty-sixth rule of the Court of Chancery and to the provisions of the statute, *Rev. Code Amend.* 652. as constituting him a competent witness through a party to the

record in the case, because he had been called and examined at the instance of the adverse party in the suit. But we consider that the rule referred to only authorizes a party to the record to testify as to matters in which he is not interested for a very good and obvious reason, while the provisions of the statute construing the first as qualified by the second section of it clearly import, we think, that only a party adverse in interest as well as adverse in his position on the record of the suit is embraced within the true meaning and correct construction of them. These provisions of the statute we are well informed, however, are in point of fact but a literal transcript nearly of a similar statute previously enacted by the legislature of the State of New York, under which it has been decided in the courts of that State that the act of that State enabling parties in civil suits to call any adverse party as a witness was intended only to obviate the technical objection arising from the person called being a party to the record, but does not render him competent if he is otherwise disqualified. *Rich v. Hasson*, 4 *Sanf.* 115. It had also been previously ruled by the courts in that State that the only disqualification designed to be removed by the statute was that of being a party to the record, but if there be any other disqualification it is not removed by the statute. *Pillow v. Bushnell*, 5 *Barb.* 156. In both of the cases cited, although the person called as a witness was an adverse party to the record, it appeared that his interest in the event of the suit was in favor of the party calling him, and he was for that reason rejected notwithstanding the terms of the statute, the court holding that the intention of the legislature in enacting it was simply to supersede the rule of the common law which excludes a party to the record from testifying as a witness even in a case in which he may have no other interest in the event of it than his liability for costs provided it should be decided against him; and that it was only intended to render such an adverse party in any case a competent witness in it when called by the opposite party, but in no other case, though willing to testify for him. Applying the same rule of construction to our statute we are of opinion that Amor H. Harvey was not a competent witness for the complainant when he was examined as such in this case, notwithstanding

he was an adverse party defendant to the record of the suit, because we think it is sufficiently apparent from the facts before stated that he was directly interested in enabling the complainant by his testimony in the case to establish the trust now contended for by him in regard to the real estate in question, that it was by the agreement and understanding of all the partners purchased and held by Achilles Hollingsworth for the use and benefit of the firm, although deeded and conveyed to him alone by the sheriff, and that so far as it had been paid for from the date of the purchase up to the time of his death, it had been paid for by him out of the funds of the firm, with the knowledge and consent of the other partners, during James Rice's lifetime, and his own after his death, as property substantially belonging to the partnership. Because, as we have before observed, he had himself previously filed a bill in the court below against his co-defendants in this suit for a similar purpose, so far as the real estate then and now in controversy was concerned, with this difference only, that in that case the suit was by him as the surviving partner of the second firm of Hollingsworth, Harvey & Co., consisting of himself and Achilles Hollingsworth, after the withdrawal of James Rice from it, and was based on his equitable claim to one-half of it, as land held in trust by Hollingsworth for that firm, instead of the equitable claim now asserted by the complainant in this case to the one-third of it, as land held in trust by the same trustee for the first firm of Hollingsworth, Harvey & Co., consisting of himself, Achilles Hollingsworth, and James Rice, up to the time of the retirement of the latter from it; the only difference between his interest in that case and in this being the difference between the one-half and the one-third of it merely, but which, of course, constitutes no difference whatever in contemplation of law when we come to consider how far the direct interest to either extent which he may have in the event of this suit, rendered him an incompetent witness for the complainant at the time when his deposition was taken in it. The counsel for the complainant in their argument upon this point of the case contended that so far as Harvey was then interested it was an interest in the question only, and not in the result of the suit itself to be decided by the court, and

that he was, therefore, a competent witness for the complainant under the rule of court and the statute before referred to and the decision of the courts in New York in the cases already cited. To our apprehension, however, he was interested not only in the question to be decided, but as a partner in both of the firms of Hollingsworth, Harvey & Co., so long as they respectively continued in existence he was directly interested in the very matter of this suit itself, the real estate involved in it, and, of course, in the result or event of it. For if the court below had decided, or this court should now decide, in conformity with his testimony (and which we may here add is the only direct testimony we have to that effect in the case) that the real estate in question was by the agreement of all the partners in the first firm purchased by Achilles Hollingsworth and taken in his name alone for the use and benefit of their firm, and so far as it had been paid for up to the time of his death that it had been paid for by him out of the partnership funds of the firm, and that it was therefore bought and held by him in trust for their firm, as one of the three equal partners in it up to the time of James Rice's retirement from it, he would certainly then have been, or would now be, *prima facie* equitably entitled to the one-third of it. This we certainly can say would be *prima facie* the direct and necessary result and conclusion of the case if such a decision had then been made in it by the court below or should now be made in it by this court.

We have before adverted to the bill previously filed by Mr. Harvey against his co-defendants in this suit in the court below, the decree of the late chancellor dismissing it, and to the fact that an appeal from that decree to this court had not been barred by the provisions of the statute of limitations applicable in such a case, when his deposition was taken in this suit, although the right of appeal from it is now barred if no appeal from it had been taken by him within the time limited by the statute; but whether, if it had been so taken, it would now be available for the enforcement of his equitable rights and claim against the defendants in that suit, and the recovery of his equitable interest, as one of the three partners in the first firm of Hollingsworth, Harvey & Co. in the one-third of the real estate in question,

had such a decision been made in this suit in the court below, or should now be made in it by this court, as we have before supposed for argument's sake, or what other remedy therefor he may have in such case, or what effect the discrepancies which appear between his bill of complaint in that suit and his answer filed and deposition taken in this case, might then have had, or may now have on his equitable claim to the one equal third part of the real estate in controversy in the alternative decisions before suggested, we do not consider at all material to the determination of the question of his direct interest *prima facie* in the result of this suit in the event of its being so decided by us; because viewed in the simple light in which the question is now presented to us, he is in our judgment clearly and directly interested in the result of the suit, and will gain by it an adjudicated equitable interest in one-third of the real estate in question, in case we decide in favor of the complainant on the grounds alleged by him that it was bought and held by Achilles Hollingsworth, and was paid for by him as before mentioned in trust for the firm, unless the contrary thereof should hereafter in some other suit be made to appear to the satisfaction of the court. In this aspect, therefor, his interest is identical with and not adverse to the interest of the complainant in the suit. Besides, and this we consider equally conclusive on the question of his being an adverse party in the case, no decree is sought against him in the suit, not even for the payment or satisfaction of any part of the alleged large amount of indebtedness of the first firm of Hollingsworth, Harvey & Co. to James Rice at the time of his retirement from it, for moneys alleged to have been advanced and loaned to it by him while he was a partner in it, and which constitutes so large a portcion of the complainant's case, as presented in the bill of complaint with his proofs and exhibits against his co-defendants, and the real estate in question, or any other property in their hands which might be found subject to such claim. We are, therefore, of the opinion that Amor H. Harvey, although technically an adverse party defendant to the record of this suit, was not a competent witness for the complainant, and we have accordingly excluded his entire deposition from our consideration of the evidence taken and of the facts alleged and admitted in the case.

We would also remark in this connection that none of the admissions made in the separate answer of Harvey in favor of the claim of the plaintiff in any of its essential particulars, as alleged in his bill of complaint, and denied by his co-defendants in their joint and several answer, can be read in evidence against the latter, although the complainant and the latter defendants are the legal representatives of two of the deceased members of the first firm of Hollingsworth, Harvey & Co., which was dissolved in the year 1854 by the withdrawal of James Rice from it, and Harvey, the other defendant, was also the other member of it, and the question between them is the settlement of Rice's claims against that late firm for his equitable share and interest in the real estate which it is alleged was held in trust for that firm, and for the payment of its debts and the final adjustment of the partnership rights and interest of the several members of it *inter se* after the dissolution of the firm in that year, the connection of the partners as such having long since ceased and determined by the dissolution of the firm, Harvey not even being the surviving partner of it, as he was of the firm of the same name which succeeded it. 2 *Dan. Ch. Pl. & Pr.* 981; 1 *Greenl. Ev.*, sec. 178; *Chapin v. Colman*, 11 *Pick.* 331. Nor can any statements or admissions made by Mr. Harvey to or in the presence of the witness Mr. Robb, in the absence of the complainant, in regard to Achilles Hollingsworth's individual and separate ownership of the real estate, or to the effect that it was not held in trust by him for the use and benefit of the firm be competent evidence in this case against the claim of the complainant in any of its branches or particulars, as the same are alleged and set forth in his bill of complaint.

With the evidence before specially referred to, and particularly the deposition of Mr. Harvey, which was taken subject to the exception filed before the commissioner, and the opinion of the court as to its admissibility, ruled out and entirely excluded from the case, the next most important question which presents itself for our consideration in relation to the proof introduced on behalf of the complainant, and which was very much controverted and discussed both in the examination of the various witnesses who were called on either side as experts in the busi-

ness of bookkeeping, and in the argument of the case by the counsel in this court is as to the true meaning, character, and construction of certain entries and accounts made and kept on the books of the firm of Hollingsworth, Harvey & Co. and other papers found among them in the handwriting of Achilles Hollingsworth, so far as they relate to the real estate from the time of its purchase at sheriff's sale in August, 1849, until the year 1858, when Mr. Robb became the bookkeeper of the firm, put in evidence, and to which we have been specially referred at much length and in minute detail, the chief dispute between the parties with regard to them being whether the entries and accounts referred to, as so made and kept on the books of the firm by him during that time, properly import upon their face a personal account of his own, as a member of the firm, for expenditures out of the funds of it by him on account of the real estate as his own separate and individual property, and for payments of principal and interest on the mortgages of it executed by him to the prior lien holders to secure the balance of the purchase-money after the payment of the ten per cent. of it by him out of the funds of the firm at the time of the purchase, and for subsequent alterations, improvements, and repairs of one of the buildings on the premises at the time of the purchase, and taxes and insurance on the real estate so purchased by him, or whether they properly import upon their face a partnership account of the firm for expenditures so made by him out of the funds of it for and on account of the real estate as the partnership property of the firm in fact, and not his own individual property. It should be observed in continuation of this summary statement that there are certain credits entered by him in the accounts referred to in the books of the firm of rents received by him from time to time from tenants of certain portions of the premises in question, not required or occupied by the firm in its partnership business, consisting of private residences, and rented to such tenants for that reason.

Upon this vexed question we regret, although we cannot add that we are surprised, to find that the professed experts to whom we have before alluded have radically differed in the opinions which they have expressed in respect to it, those examined on

behalf of the complainant unanimously holding that the entries and accounts, as so made and kept on the books of the firm by him, in their opinion import a firm or partnership account, and that the real estate to which they relate belonged to the firm, and not to Achilles Hollingsworth, the keeper of the accounts, individually, as his separate property, while those examined on behalf of the real defendants in the suit are unanimously of the opinion that they import a personal account of Achilles Hollingsworth, as one of the members of the firm, and that the real estate referred to in them belonged to him separately and individually, and not to the firm. Inasmuch, however, as it is manifest from an inspection of the accounts and books themselves, and it is conceded on both sides that the keeper of them, Mr. Hollingsworth, was evidently not an expert in what they have termed the science of bookkeeping, and that the accounts referred to are not kept by him according to any system or method of bookkeeping now recognized and approved by experts in that branch of business, it may well be doubted, we think, whether the question presented is a proper one to be solved by the opinions alone of persons particularly versed in the business according to the best and most approved methods now pursued by them. Because, if they were not kept, as it is admitted, according to any well-recognized and established plan of keeping commercial, manufacturing, or partnership accounts, why should the question as to the import of them be decided by rules which properly apply only to such a plan? But after all, the true question to be considered and decided by us in regard to the matter is, What did Achilles Hollingsworth himself mean and intend with reference to the actual and true ownership of the real estate, when the entries were so made by him on the books of the firm and the other papers referred to, as we now find them? Upon this point there is no direct evidence, and hence the effort to ascertain and fix the construction to be given to them by the opinions and testimony of the witnesses examined as experts in reference to them; but the marked and almost equal division of opinion between them in regard to the matter, viewed even in the light in which they alone considered it, had only added another to the real question, we think, which

substantially underlies it. What Achilles Hollingsworth himself meant when he made the entries in the accounts and papers referred to, so far as the actual ownership of the real estate was involved or concerned in them, must therefore be left, not to surmise or conjecture on our part, but to the most reasonable inference or presumption which arises from them in respect to that matter when considered in connection with such other facts and circumstances proved in the case as tend to throw any light upon it.

And considering such well-established facts in the case as we think are calculated and combine to shed no little or deceptive light on this question, the first to which we will refer is the fact that the real estate in question, in addition to other and prior liens amounting in the aggregate to about ten thousand dollars, was subject to a judgment of the firm of Hollingsworth, Harvey & Co. against the firm of Hollingsworth & Teas, then the owners of a part of it, and the members of which were at the same time the individual owners of the other part of it, for two thousand six hundred and fifty dollars, and also to two judgments of James Rice, one of the members of the firm of Hollingsworth, Harvey & Co., against the same defendants, and then owners of it, as before mentioned, the one for one thousand five hundred dollars, and the other for one thousand two hundred dollars. It was then the site and place of a partnership business similar to that of the firm of Hollingsworth, Harvey & Co. carried on by Hollingsworth & Teas, and was well adapted to and favorably located in the city of Wilmington for such business. At the sheriff's sale before mentioned, it was bid off by Achilles Hollingsworth for ten thousand and forty dollars, and for a sum just sufficient to cover all the liens resting upon it, and having priority to the judgment of the firm of Hollingsworth, Harvey & Co. for two thousand six hundred and fifty dollars; and although no part of the proceeds of sale were applicable to it, or to either of the still younger judgments of James Rice before mentioned, it is a fact, we think, of no little import and significance in this connection that both James Rice and Amor H. Harvey quietly and silently acquiesced in his purchase of it at that price, and seem to have had no motive or

interest to make it sell for a larger sum, notwithstanding the three next oldest judgments in which they were respectively interested, as we have just seen, were entirely lost and sacrificed by it, unless they expected to obtain some equivalent for that loss, as members of the firm with Achilles Hollingsworth, in the purchase of the real estate by him on that occasion. And accordingly we hear nothing from them in relation to the matter, and nothing further from any quarter in regard to either of those judgments, until Teas, one of the members of the late firm of Hollingsworth & Teas, afterward voluntarily paid to Achilles Hollingsworth the sum of over one thousand one hundred dollars on the first of them; that is to say, on the judgment of the firm of Hollingsworth, Harvey & Co. for two thousand six hundred and fifty dollars, against that firm, for his own release from his part of it; and the weight and effect and bearing of this latter circumstance upon the point we are now considering will only be the more apparent and striking when we recall to mind, in connection with it the testimony of James Hollingsworth, the other member of that late firm, in which he says in his answer to the eleventh interrogatory propounded to him: "After the sale I had a conversation with both Achilles Hollingsworth and James Rice; I told them that I felt under no moral obligation to pay the debts of the firm or of Mr. Rice either; that they had got the property for half what it was worth; if I was ever able to pay it I would, but I felt under no moral obligations to do it. I considered that they had got sufficient to pay it, and more too," evidently meaning by the use of the terms, "the debts of the firm or of Mr. Rice either," the judgment of the firm of Hollingsworth, Harvey & Co. for two thousand six hundred and fifty dollars against his late firm of Hollingsworth & Teas, and one or both of the two judgments before mentioned of James Rice against the same; and that the firm of which both Achilles Hollingsworth and James Rice were members, that is to say, the firm of Hollingsworth, Harvey & Co., by the sheriff's sale, and their purchase of the real estate in question, had got it so much below its actual value that they had both been more than paid in point of fact for the judgments referred to which they held against his late firm. Whether either of them made any

reply to his remarks as thus detailed in his deposition is not stated, but as none is given, it is but reasonable to infer that neither of them denied that the firm of Hollingsworth, Harvey & Co. had become, by virtue of the sale referred to by him, the actual owners of the property.

The next in the order which we propose to pursue of the facts proved in the case, for the purpose which we have in view, has already been briefly adverted to, but we now recur to it again, and that is that one of the chief inducements which led to the purchase of the property by Achilles Hollingsworth was its peculiar fitness for the business of his firm as before stated. In the emphatic language of the same witness, when speaking of it in his deposition. "It was just the place for their business, and it was very natural for them to transfer their business to that place if they bought it." But notwithstanding it was not bought by them or conveyed to them, we find that the firm of Hollingsworth, Harvey & Co., soon after the purchase, transferred their business to it, took possession of, and continued to occupy and use so much of it in their partnership business as was required for that purpose, until the final dissolution of the firm of that name, and the discontinuance of the business by the death of Achilles Hollingsworth in the year 1865, without paying any rent to him for the same during that time, or any being charged to the firm by him on the books of it, or in any account stated or prepared by him in relation to it, or any of the members of it, so far as the evidence in this case goes, although the rental value of the premises so used and occupied by the firm during that time was, after his death, estimated, it seems, in the attempted settlement between Mr. Pennypacker and Mr. Harvey, at six hundred dollars per annum.

The next fact to which we shall refer, for the purpose stated, is proved by the testimony of the witness, Mrs. Patton, in regard to her renting, in the year 1860 or 1861, one of the dwelling-houses on a part of the real estate at the time of the purchase, but not required for the business or uses of the firm, and which had been previously rented to other tenants from the time the firm entered into possession of that portion of the premises which was occupied and used by them in their partnership busi-

ness. We only refer to so much of her deposition and the statement contained in it as stands unquestioned and unimpugned by the counsel for the defendants, the substance of which is, that she went there in 1860 or 1861, and lived there not longer than five years; she afterward adds, "I rented the house. I applied to Achilles Hollingsworth for the house. I found him down at the office of the firm at the machine shop. The firm of Hollingsworth, Harvey & Co. were indebted to me at that time in two thousand dollars; my husband had loaned the money. The firm paid me interest on the money prior to my taking the house; it was very hard to get it, and it was because I had hard work to get my interest that I applied for the house. I got the house to rent when I first applied to Mr. Hollingsworth for it. He did not hesitate a moment. Mrs. Baird lived there six year before I took it. She moved out to accommodate me, and let me in. I had no written lease at any time while I was in the house. I paid no rent, but lived in the house for the one hundred and twenty dollars a year—the interest. I never gave any receipt for the interest or received any receipt for the rent."

The next evidence in the case which we shall notice is the paper marked A, filed as an exhibit in the case on behalf of the complainant, found among the papers of the firm of Hollingsworth, Harvey & Co., and proved, and not denied, to be in the handwriting of Achilles Hollingsworth. The date of it, or when the statement which it contains was made by him, does not appear upon it, but the calculations of interest on the several mortgages against him referred to it in from the last preceding payment thereon in the year 1853 render it probable and reasonable to presume that it was made not a great while before James Rice's retirement from the firm, early in 1854, and about the time when it was found necessary, from the pecuniary embarrassment in which it was then involved, to obtain an extension of credit upon some of its liabilities, and the purpose of the paper would therefore seem to have been to show by an exhibit of its assets and liabilities, that, although the firm was then embarrassed, it was not insolvent. The statement is as follows:

PAPER MARKED "A."

*Mortgages.**Wilmington Savings Fund.**Mortgages against A. Hollingsworth.*

Wilmington Savings Fund, ...	\$3,000 00
Farmers' Bank, now held by the Sav-	
ings' Fund, ...	2,100 00
Del. Fire Ins., ...	450 00
McDaniel & Harvey, ...	1,800 00
John Rice, ...	1,595 64
Robert E. Poole, ...	400 00
	—————\$9,245 66
Interest due, ...	279 00
	—————
	\$9,524 66

Judgments against Hollingsworth, Harvey & Co.

Henry Rice, ...	\$ 900 00
John Rice, ...	1,950 00
Elizabeth Saunders, ...	1,100 00
Samuel McCaulley, ...	1,000 00
Robert E. Poole, ...	1,000 00
Jarrett Megaw, ...	600 00
Marena Jones, ...	205 00
Alexander Patton, ...	2,000 00
	—————8,755 00

	\$18,279 66
Bills payable, ...	8,118 16
Book ac. agst, ...	5,254 56
Do.	493 00
	—————
	\$32,146 22

Real Estate, ...	\$14,000 00
Shop, tools, etc., ...	21,580 00
Saw Mill, ...	1,500 00
Bills receivable, ...	1,559 00
Book accounts, ...	4,012 39
	—————42,651 39

\$10,495 17

First on the list of liabilities, it will be observed, is stated the mortgages against himself, and which were executed by him individually, of course, as the sole legal owner of the real estate in question, and which was mortgaged by him to the several mortgagees stated, who were the prior lien-holders to whom the balance of the purchase-money was payable on the confirmation of the sheriff's sale by the court, and to secure which, and obtain time for the payment of it, these mortgages, by an arrangement with them, were executed by him. And following them next will be found stated in the list of liabilities the judgment against the firm of Hollingsworth, Harvey & Co., and then, in the same list, bills payable and book accounts against the firm, making, when added up, the total amount of the liabilities of the firm thirty-two thousand one hundred and forty-six dollars and twenty-two cents. And then, and in the last place, follows a statement of the assets of the firm, and first on this list we find its real estate rated at fourteen thousand dollars; its shop, tools, etc., at twenty-one thousand five hundred and eighty dollars; saw mill at one thousand five hundred dollars; bills receivable, one thousand five hundred and fifty-nine dollars, and book accounts, four thousand and twelve dollars and thirty-nine cents, making the total amount of assets forty-two thousand six hundred and fifty-one dollars and thirty-nine cents, which, deducted from the total amount of liabilities, leaves a net balance of assets of ten thousand four hundred and ninety-five dollars and seventeen cents. But the only question which it presents for inquiry, in connection with the other facts proved to which we have before particularly referred, is, what did he mean by including in the liabilities of the firm the mortgages of the real estate executed by him individually, and in the assets of it that same real estate which had been sold and conveyed to him individually? For it is proved, and not denied, that if the firm did not own *that* real estate, it owned none. The account of liabilities and assets as thus stated by him, without any connection with or reference to his own name or legal title, in the entry of the real estate among the assets of the firm and with other valuable property, such as the "tools, etc.," which clearly belonged to it, certainly relieves it of any of the uncer-

tainty or ambiguity which characterizes some of the entries made by him in connection with or concerning the real estate on the books of the firm. And, as in the absence of any competent and direct evidence as to the interest of the firm in the real estate, we have thus far been reviewing the facts stated with a view to ascertain what is to be the most reasonable inference and presumption warranted by them and to be judicially drawn from them, may we not hold, with reference to this particular paper at least, that it goes even beyond presumption, and actually implies a deliberate admission on the part of Mr. Hollingsworth that the firm of Hollingsworth, Harvey & Co. at that time owned the real estate therein referred to, and in some way not incompatible with his deeds for it? This inquiry has been met with the suggestion that as his own absolute property, free of any trust, it would nevertheless have been liable for the debts of the firm of which he was a member, and recognizing, as he evidently did, in the first part of the statement, that it was so liable for the debts of the firm, he might well have included it afterward in his statement of the assets of the firm. But if that was his idea or his meaning, to be consistent and to complete the statement he should have included not only all his own separate property, but all the separate property of each of his copartners in the assets of the firm. And yet how could he reckon the mortgages against himself alone, although executed to secure the balance of the purchase-money, among the liabilities of the firm in any matter whatever, unless the firm had some property or ownership in point of fact in the real estate which alone was subject to the payment of them?

It further satisfactorily appears from the evidence in this case that Mr. Hollingsworth was the senior member of the firm and attended principally to the financial business of it, and had charge of and kept the books of it in his own handwriting chiefly until the year 1858, when Mr. Robb was employed as clerk, who afterward kept them until his death, in 1865, in like manner and mainly under his supervision and direction, but that they were always open to the view and inspection of the other members of the firm during business hours. That James Rice became a member of it in the month of January, 1842, as an

equal partner in it with Achilles Hollingsworth and Amor H. Harvey, the other equal partners in it, but, being engaged in another business in the city, he took no active part in the transaction of its business, and paid no personal attention to any branch or portion of it during the time he continued a member of it, which was until about the first of the year 1854, when he voluntarily withdrew from it in consequence of the embarrassment in which he had become involved in his other business. That the real estate in question was advertised and sold by the sheriff of the county on or about the 18th day of August, 1849, under execution process issued upon two of the several mortgages and judgments against the firm of Hollingsworth & Teas, with which it was then encumbered, the first of them being a judgment in favor of the Wilmington Savings Fund Society, recovered on a first mortgage made by James Hollingsworth, a member of that firm, and his wife, to secure a debt of two thousand six hundred dollars, and the other the judgment of James Rice against that firm for one thousand two hundred dollars before stated, while among the other judgments which then rested upon it, but on which no executions were then in the hands of the sheriff, was included the judgment of the firm of Hollingsworth, Harvey & Co. against that firm for two thousand six hundred and fifty dollars, and the other judgment of James Rice for one thousand five hundred dollars before stated. Excluding the testimony of Mr. Harvey for any purpose whatever in the case, we think that of Mr. Valentine, who was at the sale, warrants the conclusion that all of the members of the firm of Hollingsworth, Harvey & Co. also attended it. Achilles Hollingsworth was the highest bidder at the sale, and all the real estate which was advertised to be sold in two allotments was struck off to him, one allotment for four thousand dollars and the other for six thousand and forty dollars, aggregating ten thousand and forty dollars. Ten per cent. of it was required to be paid on the day of sale, and the balance of it on the return and confirmation of the sale at the following November term of the court. The ten per cent. was not paid on the day of sale, but whether any, or what kind of a note or other security was given to the sheriff for it, or by whom, aside from the testimony

of Mr. Harvey does not appear from the evidence. It does appear, however, that interest upon it at the rate of six per cent. was afterward paid on or about the 24th of October following, when the principal of it was also paid to the sheriff.

In the meanwhile, the first entry that appears on the books of the firm, and which is admitted to be in relation to this real estate and in the handwriting of Mr. Hollingsworth, is a brief account on page 6 of book marked 33 by the examiner in this case, which is entered under the following heading in the book and in the following form:

DR. REAL ESTATE. CR.

1849.

Sept. 1. To cash paid Isaac Hollingsworth for fixing up shop, ...	\$4 00
Oct. 9. To cash paid Mutual Insurance Co. for one year's insurance, ...	9 26

It is the only entry on that page or on the next four pages of the book, while the accounts on the preceding pages of it extend back from 1843 to 1838, and on the succeeding pages of it forward from 1843 to 1850, with a regular numbering of the pages from the commencement of them up to page 66, and then with a new numbering of them from 1 up to 6, on which we find the above entry, and from that on with regularity to page 265; there are, however, numerous pages in it still remaining entirely blank. It perplexed some of the expert bookkeepers examined as witnesses in the case not a little to determine whether it is to be considered an original or ledger entry; but considered alone as it thus stands on the book by itself, and without any reference to a subsequent entry made by him on another book of the firm, to which we shall next have occasion to turn, they all on both sides seem to agree that it properly imports on the books of the firm a firm account, and that the firm was the owner of the real estate referred to in the heading of it. And judged by their rule or standard of decision only, it would seem as clearly to import an admission of his part that at the time when that account was opened and these entries were made

by him the real estate referred to was the real estate of the firm.

As before stated, the ten per cent. of the purchase-money, with the interest upon it from the day of sale, amounting to one thousand and fifteen dollars, as calculated by him, was paid to the sheriff about the 24th of October of that year, out of the funds of the firm, as satisfactorily appears from the evidence and is not controverted in the case. The sale was thereupon returned and confirmed at the following November term of the court, and on the 28th day of December following the sheriff executed and delivered to Achilles Hollingsworth two deeds in fee simple for the two allotments of the real estate so sold to him on the 18th of August preceding, and on the same day on which the deeds were delivered to him, Mr. Hollingsworth, to secure the payment of the balance of the purchase-money, which amounted to nine thousand and thirty-six dollars, and was applicable to the mortgages and judgments of the prior lien-holders before referred to, pursuant to an arrangement with them for the purpose, executed mortgages of himself and wife to them upon the real estate so sold and conveyed to him by the sheriff, as follows:

1. To the Wilmington Savings Fund Society, dated December 28th, 1849, for	\$ 2,400 00
2. To Ann Billany (same date), for	700 00
3. To the Delaware Fire Insurance Company (same date), for	450 00
4. To the Farmers' Bank (same date), for	2,100 00
5. To McDaniel & Harvey (same date), for	1,800 00
And also his judgment bond to John Rice (same date), upon which judgment was entered, for	1,595 64
Add 10 per cent. above named, ...	1,004 00
Making the total sum of	\$10,049 64

And which the defendants, Mrs. Hollingsworth and Mr. Pennypacker, in their answer allege were executed to the said parties respectively, in pursuance of an arrangement made by him with them that the several amounts thereof (which had been previously loaned to James Hollingsworth, or to Hollingsworth

& Teas, and which were to be paid off with the proceeds of the said sheriff's sale) should be loaned to him, and that he was thus enabled to make up without any aid from his firm, beyond the loan of the ten per cent. of the purchase-money as aforesaid, the full amount of such purchase-money (ten thousand and forty dollars).

The next entry and account on the books of the firm in the handwriting of Achilles Hollingsworth is the one that has given rise chiefly, if not solely, to the controversy in the case about who paid for the real estate in question, so far as it was paid for from the 24th of October, 1849, up to the time of his death, Achilles Hollingsworth, or the firm of Hollingsworth, Harvey & Co., and to the real dispute and exact question involved in it, as we consider it, whether he meant it to be when he entered it, as we find it on the books of the firm, a firm account of a personal account of his own merely as one of the members of it. It relates to the ten per cent. of the purchase-money (one thousand and four dollars) and the interest thereon for sixty days, ten dollars, paid by him on the 24th of October, 1849, as we have before seen, with the checks of the firm, as appears from them and the entries in the bank book of the firm of that date, and some other payments made by him on account of the real estate up to the date of the entries in addition to the ten per cent. of the purchase-money and the interest on it until it was paid. It is on page 1030 of the book marked D, and is as follows:

WILMINGTON, Dec. 31st, 1849.

Achilles Hollingsworth (for real estate) Dr. to cash	
for ten hundred and four dollars which he paid	
to Isaac Grubb, sheriff, in October last, being	
ten per cent. of the purchase-money on the	
property of late James Hollingsworth and	
Joseph Teas, of which he purchased at sheriff's	
sale in August last, ...	
	\$1,004 00
For ten dollars paid interest on the above acct. for	
60 days, ...	
	10 00
For eleven 50-100 dollars paid Thos. S. Mehaffy,	
tax against H. Teas' property, ...	
	11 50

For sundry expenses to New Castle, ...	\$ 3 50
Three dollars paid Isaac Hollingsworth for fasten- ing up shop, ...	3 00
Nine 26-100 dollars paid Insurance Company, Oct. 14th, ...	9 26
Two 12-100 dollars paid Biddle, Prothonotary, . . .	2 12
Twenty dollars paid to Mrs. Ann Billany, for inter- est on bond, ...	20 00
	\$1,083 38

There are also sundry other accounts in his handwriting in relation to expenditures upon or concerning the real estate on other books of the firm, and particularly upon page 179 of book marked C, and ledger page 37 of book marked E, and ledger page 55 of book marked 32, headed "A. H. for real est.," as to the import of which, as well as the import of the account just stated in full, the experts examined equally differed, those on behalf of the complainant holding that they clearly imported real estate belonging to the firm, and those on behalf of the defendants, Mrs. Hollingsworth and Mr. Pennypacker, that they clearly imported real estate belonging to Achilles Hollingsworth individually; and yet it appears from the day books of the firm also kept by him that original entries of charges to him for or on account of the real estate are made to no small amount in the aggregate, which are not posted to his accounts for real estate in the ledgers, while there is otherwise no little evidence furnished by the books themselves that they were not only unskillfully, but sometimes inaccurately, if not carelessly, kept by him. As proof of this, we will take occasion to specially refer to but one example of it, because it is so palpable that the defendants above named were obliged to admit the important fact alleged in the bill of complaint that there was at the time of the purchase of the real estate a considerable amount of machinery affixed to it, a large portion of which after the purchase and after they had entered into possession of the premises the firm sold and appropriated the proceeds of the sale of it to their own use, and that no claim to the same was

then made by Achilles Hollingsworth. This they could only explain by a counter statement, if it be correct, imputing to him an obvious error, as he was then the keeper of the books of the firm, and made the entries in the account in relation to the matter to which they refer in their answer to the bill on that point, and which is to this effect: that at the time of the purchase of the real estate all the machinery on the premises passed to him as the purchaser, as a part thereof, but at the request of the firm and upon their representation that the two engines and boilers and a trip-hammer which constituted a portion of it were too large for the purposes of the firm, they were sold, the firm agreeing at the same time with him to put in a smaller engine and boilers, which they did, and to expend an amount equal to that for which the two engines, boilers, and trip-hammer were sold in putting another story on and in otherwise improving the shop upon the premises; further, that in making the improvement, the firm charged him in his real estate account with all the brick and other materials used in and with all the work and labor done upon the shop, and erroneously credited the receipts from the sale of the said engine, boilers, and trip-hammer to the shop account of the firm, instead of to the said Achilles Hollingsworth, and that too without replacing said engines, boilers, and trip-hammer with machinery of equal value, according to the agreement. And here, without repeating what we have before said in regard to the remarkable difference of opinion expressed by the experts as to the scientific import of the headings and entries of the several real estate accounts as kept by him on the books of the firm to which we have referred, and in view of the fact that they are doubtless justly susceptible of either of the constructions which in the judgment of such witnesses has been given to them, may we not reasonably presume that he meant they should have both in the better understanding and more familiar knowledge of all that pertained to the interests and affairs of the firm, possessed by his copartners in it, and of their respective relations to it, and that they were so entered and kept by him simply to show to them that while he was drawing money from the copartnership funds of the firm to the amount which has

been satisfactorily proved in this case, he was honestly charging himself with it on the books of the firm, and was at the same time honestly expending it on the real estate which was held in his name for the benefit of the firm, if it be true that it was so held by him according to the understandings of all the members of it, as the complainant contends? For it only remains for us to add on this point that it clearly appears from the books that he kept no account whatever that can be strictly and appropriately called or considered a personal account of his own as an individual member of the firm, separate or distinct from such as those we have been considering, and that if he did not intend them to be understood and considered as firm accounts also, then it was very strange as well as injudicious and unfortunate for him that he inserted and kept them all among the firm accounts of the copartnership exclusively, instead of in a separate and distinct account of his own and rather in the form of partnership accounts than in the form of personal accounts simply.

It is stated both in the bill and in the answer of the defendants before referred to, and who, we may here say, are the only parties to this suit actually adverse in interest to the claims and demands of the complainant, or who deny or controvert any of the material statements on which they are founded, that Achilles Hollingsworth paid on the foregoing mortgages and securities executed by him to secure the balance of the purchase-money for the real estate as before stated, between the date of their execution and his death in 1865, both the principal and interest of the following:

The mortgage of Ann Billany, for	\$ 700 00
On the mortgage of McDaniel & Harvey, for \$1,800,	800 00
The judgment of John Rice, ...	1,595 64

	\$3,095 64

The above statement as carried out in the column of figures on the right hand contains only the amount of the principal paid on the several securities mentioned; but it is contended by

the complainant, and from the cash books, bank, or check books, and the canceled checks of the firm in the handwriting of Achilles Hollingsworth produced in evidence, taken together (the bank or check books supplying in a few instances the deficiency in the non-production of the canceled check for the same amount), it appears that there was also paid by him during the same period, out of the partnership funds of the firm, interest on the several securities so executed by him for the balance of the purchase-money for the real estate to the aggregate amount of seven thousand and sixty dollars and forty-four cents. And they also further show that the payments of the interest so made by him were charged by him invariably in the firm accounts on the books of the firm, or were not charged at all by him; while the evidence in the case does not show any payment of the interest as otherwise made by him, except the amount of five hundred and seventy-four dollars so paid by him and wholly unaccounted for.

In opposition to the foregoing review of the facts in the case clearly and satisfactorily established, to be considered by us as the evidence of the equitable claim asserted by the complainant on behalf of the firm to the real estate in question, it must be admitted that there is but little, if any, direct and positive proof on the other side beyond the admitted and fundamental fact on which the case proceeds from its inception, and that is, that the unqualified legal title to it was vested in Achilles Hollingsworth from the delivery of the deeds of the sheriff to him, with the ruling before announced excluding the admissions of Mr. Harvey as testified to by Mr. Robb in the absence of the complainant as wholly incompetent and inadmissible to affect or compromise in any manner his rights or interests in this suit. And without that testimony, and the statements and admissions of Mr. Harvey, made either to him or Mr. Pennypacker, on the occasions referred to, and as detailed by him, the question upon the proof as to the actual and *bona fide* and beneficial ownership of the real estate, seems now on the part of the defendants to depend entirely upon the construction we are to give to the several accounts pertaining to it on the books of the firm, from the purchase of it up to the time of the death of Achilles Hollings-

worth, and the other papers produced in evidence in relation to it. In the answer of the defendants it was expressly denied that any of the payments for the real estate were made by Achilles Hollingsworth out of the partnership funds of the firm, and alleged that the same were made from his individual funds and on his own individual account. But on the evidence coming in, and with the proof before us in the case that the first payment of one thousand and four dollars in cash was made out of the partnership funds for it, prior even to the acquisition of the legal title to it by him, and that, on the same day he acquired the legal title to it, he executed mortgages upon it to secure the balance of the purchase-money to the parties respectively entitled to it, and that all the payments of principal and interest that were afterward made upon them during his lifetime were made by him out of the partnership funds, the ground of defense has been shifted on that branch of the case, and has practically resolved itself into the single question whether the firm loaned him the money with which they were so made for that purpose, or whether it merely furnished the money to be so paid by him for the use and benefit of the firm as virtually the *bona fide* purchasers, holders, and oners of it from the time of the purchase, although the deeds for it had been executed to him alone, as the sole purchaser of it. And, as we have before said, the defendants, to establish their contention that it was a loan of the money by the firm to him as the sole and absolute owner of it, for the purpose of enabling him to pay for it as such owner, now rely almost entirely, if not exclusively, on the construction to be given to his real estate accounts, as well of receipts of rents from tenants in possession of parts of the real estate, as of expenditures made upon it, as they appear on the books of the firm.

But as this is now the vexed question of the case, and is still open to further inquiry and consideration, we must again resort to what would seem to be the most reasonable and material presumptions which arise out of all the facts and circumstances proved in the case that bear upon the question. And the first which presents itself in this connection is the fact, too painfully and distinctly proved, that with all the frugality, industry, energy, and enterprise which characterized the firm and the individual

members of it, and with all, or nearly all, of the capital and means of the two active members of it invested and absorbed in its business, it is proved to have been, from the start up to the time of James Rice's withdrawal from it, and for several years afterward, sorely straitened and much embarrassed for the want of money to carry on their business, and although the purchase of the real estate, with all the special advantages which specially fitted it for the business of their firm, particularly upon the long credit upon which it was purchased, may have been both a desirable and judicious purchase for them, yet we cannot believe, in view of these circumstances, that any member of the firm would have considered it able to advance the money to pay for it, as a loan merely, even to the member who purchased it; while at the same time we cannot even conceive what motive either of the other members could have had for loaning him the money for that purpose, since, if the firm had to advance money to pay for it, it was obviously so much more for their interest and benefit that the firm itself should become the owner of it. Each member of it seems, from the evidence, to have had at all times quite as much as he could do to keep the firm itself supplied with sufficient funds for the transaction of its business and the maintenance of its credit and solvency by loaning to it whatever sums each could contribute from his own means, or borrow from his relations or friends, in every pecuniary emergency which arose in its affairs, and which is strikingly exemplified with reference to the partner, James Rice, in particular, by the exhibit of the long list and large amount of memorandum checks for the moneys thus loaned by him to the firm during the ten or twelve years he continued a member of it, while Achilles Hollingsworth himself, as the witness, Mr. Valentine, informs us, "always seemed to be looking after money for the firm, which, from the time he knew it all the way through up to 1862 was always hard up," to use his language. Can it then be reasonably supposed that under such circumstances and in such a condition of the firm James Rice, or any other member of it, could have thought of loaning such a large sum of money, even to their copartner, Mr. Hollingsworth, to pay for the real estate and make it his own property absolutely, when it would have

been manifestly so much better for the other members of the firm and would have required no more of the firm to make it partnership property? The question, therefore, which we have now to determine is whether, with all these facts and circumstances before us, and with direct and positive proof of a satisfactory character, that the money with which the payments before stated were made, were drawn by him from the partnership funds, and that we have no direct evidence beyond that with regard to the matter, it is more reasonable to conclude that the firm simply loaned him the money for that purpose, or that, pursuant to some understanding at the time between the partners not disclosed to us, he was to buy the real estate at the sheriff's sale, take the deeds in his own name for it, for the use and benefit of the firm, execute the mortgages to secure the future payment of the purchase-money, and the firm to supply the money for the purpose as it should be required until paid? Of these two alternative presumptions and conclusions, upon all the facts and circumstances proved, we have no hesitation in saying, after mature consideration, we deem the latter much the most reasonable and probable, and have therefore come to that conclusion in the case.

And such being the conclusion of fact to which we have arrived from the evidence, we next proceed to state the legal result to which it has led us on this branch of the case, and that is, that in the consideration of a court of equity, under the facts and circumstances proved, and the reasonable presumptions warranted by them, in our judgment Achilles Hollingsworth took and held the legal estate in the land subject to a resulting trust for the firm, then consisting of himself, Amor H. Harvey, and James Rice.

For, as a general principle, what will constitute a resulting trust in a case like this is well settled and recognized by every elementary writer on the subject, we believe. It is thus stated by *Sugden*, "If a man purchase an estate, and do not take the conveyance in his own name only, the clear result of all the cases, without a single exception, is that the trust of the legal estate, whether freehold, copyhold, or leasehold; whether taken in the name of the purchasers and others jointly, or in the

names of others without that of the purchaser; whether in one name or several; whether jointly or successively, results to the man who advances the purchase-money; and although the persons in whose name the conveyance is taken execute no declaration of trust, yet a trust will result for the person who paid the money by operation of law—this species of trust being expressly excepted out of the statute of frauds.” *Sug. on Vend.* 414, 415. *Story* also states it as an established doctrine, now no longer open to controversy, in nearly the same terms. 2 *Story Eq. Juris.*, sec. 1201. And *Spence*, treating of trusts by implication and construction of law, that is to say, of implied trusts, resulting trusts, and constructive trusts, says of the latter, “Trusts of this description depend upon the conclusions of law independently of contract, and often arise in cases where there was no intention to create a trust on the part of any of the parties concerned; generally speaking they are imposed *in invitum*.” 1 *Spence’s Eq. Jurisdiction* 508. And to show that he intends to include in this description what are more usually denominated resulting trusts, he afterward states as his first illustration of what he calls constructive trusts the case of a purchase made by a man, or by his direction, and with his own money, the conveyance being in fact taken in the name of another,—“The trust of the legal estate has been said in this case also to result to the man who advances the money.” *Ibid.* 510; *Dyer v. Dyer*, 2 *Cox.* 93. And to show that it is particularly approved and applied by courts of equity in such cases as this to joint purchasers in the way of trade and for purposes of partnership, *Story* adds in regard to it, that “The same rule is uniformly applied to joint purchases in the way of trade and for purposes of partnership, and for other commercial transactions, by analogy to, and in expansion and furtherance of the great maxim of the common law: *jus accrescendi inter mercatores pro beneficio commercii locum non habet*. In cases, therefore, where real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial in the view of a court of equity in whose name or names the purchase is made and the conveyance is taken; whether in the name of one partner, or of all the partners; whether in the name of a stranger alone, or of a stranger jointly

with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property, not subject to survivorship, and the partners are deemed the *cestuis que trust* thereof." 2 *Story Eq. Juris.*, sec. 1207. It is true, and one or more of the cases cited in the argument by the counsel for the defendants show, that in the absence of fraud or breach of trust, property purchased with partnership funds does not of necessity become partnership property if that is not the intention of the parties, as where the funds are so used by one partner in a separate purchase on his own account and for purposes wholly independent of the partnership. "But the circumstance that the payment has been made out of the partnership funds, especially if the property purchased be necessary for the ordinary operations of the partnership business, and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property; and in the absence of all countervailing circumstances it will be absolutely decisive." *Per Story, J., in the case of Hoxie v. Carr et al.*, 1 *Sum.* 181, *Harvey v. Pennypacker et al.*, pp. 25, 26, *per Bates, Chancellor*. It will be observed that we have not found in the evidence admitted in this case any direct proof of an understanding or agreement between the partners of the firm that Achilles Hollingsworth should bid off the real estate at the sheriff's sale and take deeds for it in his own name, and the firm should pay for it, although, none of them needed or could have desired to become the owners of it, except for their partnership business. There can then be of course no reason for considering the trust in this case an express trust. After having thus stated the general principle as equity jurisprudence as well recognized and settled, especially in such cases as this, and referring to the authorities cited in support of it, we do not deem it either necessary or proper to indulge in any mere supposition or conjecture to find a reason for the purchase of the real estate and for the taking of the deeds for it in Mr. Hollingsworth's name alone, but if it were allowable to do so, besides others, a sufficient and satisfactory ground for it might be found in the fact mentioned in the argument, that if not entirely free from the liens and incumbrances of other judgments at

that time, he was, at least, more so than either of the other partners.

There is no evidence in the case that there was any settlement had or account taken between James Rice and the other members of the firm, or with Achilles Hollingsworth, on his withdrawal from it in the year 1854, for or on account of his equitable rights and interests in the said real estate, or at any time before or after its dissolution by his retirement from it. It is in evidence, however, that immediately upon that dissolution the remaining partners, Mr. Hollingsworth and Mr. Harvey, proceeded under the same copartnership name, in the same copartnership business, and in possession of the same real estate, and without any other change whatever in it than his withdrawal from it, until the final and total dissolution of it afterward by the death of Mr. Hollingsworth in 1865, Mr. Rice's death having preceded his in the year 1861. It also appears that since the death of Mr. Hollingsworth, his executor, Mr. Pennypacker, and his widow and devisee, Mr. Hollingsworth, up to the time of the filing of their answer had paid the interest on the unsatisfied mortgages executed by him to secure the purchase-money, and also the

Mortgage of Del. Fire Ins. Co., for	\$ 450 00
On the Farmers' Bank Mortgage, for \$2,100.00, . . .	500 00
Bal. of McDaniel & Harvey's Mortgage, for	
\$1,800.00, ...	1,000 00
	\$1,950 00

the devisee having been in the exclusive receipt of the rents and profits of the real estate since his death.

We will next notice in this connection the objection taken to the relief sought by the complainant on this branch of the case because of the delay which had ensued in the institution of the suit. In regard to a trust of real estate, no limitation whatever exists in courts of equity against a bill to establish it without a repudiation or denial of it by the trustee, or what is equivalent to it, that he has in point of fact held the land as his own for a period of twenty years at least, and without account-

ing in any manner for the rents and profits as trustee. Courts of equity are not in terms bound by the statute of limitation, because they in terms apply to legal remedies only. But they are in effect addressed to courts of equity as well as to courts of law as it seems in all cases of concurrent jurisdiction at law and equity (as, for example, in matters of account) to which they directly apply, and in which they seem equally obligatory in each court. It has been justly observed that in such cases courts of equity do not act so much in analogy to the statutes as in obedience to them. In a great variety of other cases they act upon the analogy of the limitations at law. Thus, for example, if a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation and apply it to all cases of relief sought upon titles or claims touching real estate. 2 *Sto. Eq. Juris.*, sec. 1520; *Hovenden v. Lord Annesley*, 2 *Sch. & Lefr.* 630; *Bond v. Hopkins*, 1 *Sch. & Lefr.* 429; *Cholmondley v. Clinton*, 2 *Jac. & Walk.* 141; *Grenfelt v. Girdestone*, 2 *Younge & Coll.* 662; *White v. Parnther*, 1 *Knapp* 226; *Boone v. Chiles*, 10 *Pet.* 177; *McKnight v. Taylor*, 1 *How.* 161. These cases clearly show, first, that courts of equity have at all times upon general principles of their own, even where there was no analogous statutory bar, refused relief to stale demands where a party has slept upon his right and acquiesced for a great length of time; and secondly, that whenever a bar has been fixed by statute to the legal remedy in a court of law, the remedy in a court of equity has been confined to the same period in analogous cases. To apply the principle to the present case, it only remains to observe that we have no proof in it that Achilles Hollingsworth ever claimed or alleged that he purchased the real estate in question for himself individually, or that he paid for it with his own money or with money loaned to him for that purpose by the partnership, or that he ever repudiated or denied the trust which we consider clearly resulted for the benefit of the original firm, from the facts proved, and the payment for it by him out of the partnership funds; while it is equally clear that there was no adverse possession of it as against James Rice or his heirs-at-law until after the death of Achilles Hollingsworth in

1865, when it passed under the general devise of his real estate in his last will and testament to his widow and devisee, but who had so held and possessed it for considerably less than twenty years when this suit was commenced, and which would therefore constitute no bar under the twenty years' limitation prescribed by our statute in an analogous case in the courts of law of this State, in accordance with the well-settled principles established in the cases last cited.

We shall have occasion to say but comparatively little on any other part of the case presented in the bill of complaint. They all consist of money demands merely alleged to be due to the complainant as the administrator of James Rice, deceased from the late firm of Hollingsworth, Harvey & Co., of which he was a member from the year 1842 until the year 1854, but more particularly, as contended for in the argument, of a note alleged to have been lost and never paid for money due to him individually from the firm, and for moneys advanced and loaned to the firm from time to time by him while he was a member of it, evidenced as is alleged by numerous memorandum bank checks of the firm given to him for that purpose when such loans were made, and which still remained among his papers unpaid, and had only been discovered as late as in the year 1866, and two others in 1869, amounting in the aggregate to a very large sum of money, but to which a considerable number of counter checks of a similar description from him to the firm were produced in evidence on the other side. To all of these demands, however, against the late firm the defendants, Mr. Pennypacker and Mrs. Hollingsworth, have pleaded the statute of limitation, and as to which the complainant relies, in the first place, on a distinct acknowledgment proved to have been made by Amor H. Harvey on or about the 19th day of November, 1869, to the effect that the balance in favor of James Rice between the checks drawn by the firm and held by James Rice, and the checks of James Rice held by the firm, amounting to the sum of thirteen thousand five hundred and thirty-nine dollars and eighty-six cents, and the lost note before referred to, for two thousand five hundred and ninety-six dollars and five cents, were still subsisting demands against the said firm, to take the

case as to them out of the operation of the statute. But neither this court nor any other court of equity, we apprehend, will allow an acknowledgment of a stale demand made by a former partner so long after the dissolution of the firm and the accruing of the cause of action (fifteen years or more), and under such circumstances as accompany it and impeach the fairness and *bona fides* of the transaction in this case, to be given in evidence for the sole purpose of reviving it and taking it out of the operation of the statute, as against the legal representatives of a former and deceased partner, and in a case particularly in which no relief and no decree is prayed for against himself. The acknowledgment must, therefore, be excluded from the evidence in the case.

The other ground on which the complainant relies to take these personal claims out of the operation of the statute of limitation, is that he seeks in this case a remedy against the real estate in controversy, as being the only asset of the first firm of Hollingsworth, Harvey & Co. that is within his reach, and that he seeks the two amounts before stated, not as a personal claim against a former and living partner of it, nor against the legal representative of the former and deceased partner, or even his devisee, but having established a resulting trust in favor of the partnership in the real estate now held by Mrs. Hollingsworth, he contends that the same or its proceeds after sale under the decree of the court must be brought into court for distribution, and being necessarily brought into court for distribution by a decree that there is a resulting trust in favor of that firm, he is entitled without any further account (the balance due on the memorandum checks and note to James Rice having been definitely and finally ascertained between him and the firm, and so indorsed thereon by Achilles Hollingsworth about the time of James Rice's retirement from it), to have paid to him out of such proceeds the amounts so remaining due to him with interest to the date of the decree; and that they should be ordered to be paid out of the fund which comes into court necessarily from the sale of the real estate as assets of that firm, is a conclusion which, of course, follows from the well-settled principles of the law of partnership. They consist of advances made by

James Rice over and above his original contributions as a member to it. There are no creditors of the firm remaining unpaid, and it is therefore to be dealt with and disposed of by the court upon the rights of the partners as between themselves. These ascertained amounts and claims for advances against the fund are to be paid before any division or distribution is made among the partners; no such claims exist on the part of either of the other partners, and consequently the fund is chargeable alone with these claims of his.

After thus minutely analyzing and defining and reducing these personal claims and the real estate itself to their last stage in the Court of Chancery, as we have thus seen, the ground next taken is that he has in equity a partner's lien on all the partnership property, real or personal, of that late firm for the payment of these personal claims for advances made over and above his original contribution to its capital, for which we are referred to *Sto. on Partn.*, secs. 97, 98; *Coll. on Partn.* 125; *Hoxie v. Carr*, 1 *Sum.* 173; 1 *Ves.* 142; 5 *Metc.* 562, and which will not be questioned by us for a moment. But he then proceeds one step further, and having completely resolved the real estate into personalty in the crucible of a court of equity, as must necessarily be done by a decree to that effect in order to reach it and obtain satisfaction of those personal claims out of the fund resulting from the process under the decree, he with great inconsistency in the next place contends that his lien as such partner for such personal claims is a lien on the real estate as the sole remaining asset of that firm, and is analagous in equity to a vendor's lien for the purchase-money on land sold and delivered, in the hands of the purchasers until it is paid for, which is good for twenty years, and therefore this lien of the claims and the right to the payment of them out of the real estate cannot be barred in less time. For which we are referred to 1 *Hil. on Mort.* 656; 11 *Gill. & Johns* 218; 1 *Bland. Ch. Rep.* 236, which we find, however, have no relation to the subject of a partner's lien in such a case, but refer solely to a vendor's lien. But the law on the subject of a partner's lien in any and all cases is well settled, and is so well stated by Justice Story in the case of *Hoxie v. Carr et al.*, cited on behalf of the complain-

ant, that we shall content ourselves with the citation of it without any other authority, to show that a partner's lien, even on the real estate of his firm for advances made to it, is a personal lien purely in equity, and expires with the extinction of the claim by the bar of the statute, and in that respect bears no resemblance or analogy whatever to a vendor's lien in a court of equity. *Story, J.*, says: "A question often arises whether real estate purchased for a partnership is to be deemed for all purposes personal estate, like other effects. That it is so as to the payment of partnership debts and adjustment of partnership rights and winding up the partnership concern is clear at least in the view of a court of equity; but whether it becomes personal estate as between the executor or administrator of a deceased partner and his heir or devisee is quite a different question, upon which learned judges have entertained opposite opinions." *Hoxie v. Carr*, 1 Sum. 173.

We therefore think that the personal claims of every description embraced in the bill of complaint, except for rents and profits of said real estate and the proceeds of any part or parts of it which may have been sold, are absolutely barred by the plea of the statute of limitation, and that there are no considerations of hardship, accident, or misfortune growing out of the facts of the case, such as the loss of the note or the long delay which elapsed before the accidental discovery of the memorandum checks referred to, which could warrant a court of equity in holding otherwise in this case, since no designed or fraudulent concealment of them by any one is charged in the bill, and the fact that the note and the memorandum checks were alike barred at the time of the death of James Rice, no diligence on the part of his administrator could possibly have saved them from the bar of the statute if he had found them all on his immediately coming into his office as administrator.

The Chief Justice concurred. Wootten, Judge, absent.

Wales, J.: The view which I have taken of the law and of the evidence in this case compels me to dissent from so much of the opinion of the majority of the court as establishes a resulting trust in accordance with the prayer of the complainant.

The case is not a novel one in principle, nor do the facts as alleged on either side take it out of the ordinary range of similar claims. The complainant seeks to establish an interest in real estate, not only without a deed, but in opposition to the written and recorded title of another, and courts of equity have been for so many years and so frequently called upon to consider and decide like cases that the principles governing this class of claims have become well defined and settled. So well is this understood that, in the argument before this court, there was no dispute over these principles except as to the lapse of time necessary to bar a claim for a resulting trust. The question to be decided, therefore, is more one of fact than of law, to wit: Did Achilles Hollingsworth purchase the real estate for himself individually or as a member of the first firm of Hollingsworth, Harvey & Co., with the partnership money and for the partnership use and benefit? In other words, was there a resulting trust in Achilles Hollingsworth for the use of Hollingsworth, Harvey & Co.?

A brief consideration of the law on the subject of resulting trusts of the character set up by the complainant's bill will here be in place, before examining the evidence, in order to reach a satisfactory conclusion. As already intimated, there is little, if any, difference of opinion as to the definition of a resulting trust. Indeed, the only variance to be found in the text-books and in recent reports is one of phraseology, and not of substance. To constitute such a trust it is necessary, first, that the person in whose right the trust is claimed must have advanced the purchase-money or incurred a personal liability for its payment; second, that the purchase-money must have been paid, or the liability incurred, at the time and as part of the original transaction, and the trust must attach, if at all, by virtue of the circumstances of the transaction itself, and cannot be raised from subsequent matter arising *ex post facto*. (2 *Sugd., V. & P.* 131.) The law is well stated by Chief Justice John M. Clayton in *Newells v. Morgan*, 2 *Harr.* 229, which, like the present case, was an appeal from Chancery. The chief justice says, citing *Dyer v. Dyer*, 2 *Cox* 92: "Soon after the statute of frauds passed it was determined that if

an estate be purchased with the money of A., and the estate is conveyed to B., B. will be a trustee for A., and it is such a resulting trust by implication of law as is saved by the statute and needs no declaration. The substance of the cases on this subject appears to be that the trust of a legal estate * * * whether taken in the names of the purchasers and others jointly or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successively, results to the man who advances the purchase-money; and this in analogy to the rule of the common law that where a feoffment is made without consideration the use results to the feoffer." But the trust must have been coeval with the deeds or it cannot exist at all. The resulting trust not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the *cestui que trust* and the deed not taken in his name. The trust results from the original transaction at the time it takes place and no other time, and it is founded on the *actual payment of money* and on no other ground. (Chancellor Kent in *Batsford v. Barr, Johns. Chy.* 405.) It cannot arise from a loan—that is, where the grantee has borrowed the money with which to pay for the property and takes the deed in his own name; and if the deed is made in the name of the lender by way of security for the repayment of the loan, the equitable title will vest in the borrower. (*Boyd v. McLean, 1 Johns. Chy.* 590.)

It is well settled that a trust of this character may be proved by parol evidence, but with this doctrine is indissolubly connected another and vitally important one, to wit, that such evidence must be clear, full, and satisfactory. Says Chancellor Kent, in *Boyd v. McLean*, just referred to, "the cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and insecurity of paper title; and they have required the payment of the *cestui que trust* to be clearly proved;" and he cites the case of *Lench v. Lench, 10 Ves.* 511, where Sir William Grant did not deem the unassisted oath of a single witness to the mere naked declaration of the trustee admitting the trust as sufficient, and there were no corroborating circumstances in the case. He thought

the evidence too uncertain and dangerous to be depended upon. The doctrine of resulting trusts is admitted to be a very dangerous and questionable one, and is acted upon only with great caution, especially after much time has elapsed. In several of the States it has been done away with by legislation, except in cases of fraud, to the extent that no resulting trust shall arise or be claimed where the deed has been made to and in the name of the grantee with the knowledge and consent of the person paying the consideration. The history of the law on this subject is one of slow, hesitating, and cautious progress. At first it was doubted whether parol evidence could be received to impeach and contradict the written terms and meaning of a deed of conveyance executed with all the formalities belonging to an instrument of that nature. It was at length decided that such evidence could be admitted, not to contradict and control the written terms of the deed, but to engraft a trust upon the legal title, and that to do this the payment of the money must be clearly proved, as by evidence going directly to the fact of payment or by admissions of the nominal purchaser. The next question that came up was, whether such evidence could be admitted under any circumstances against the answer of the nominal purchaser denying the facts on which it was attempted to establish the trust; and this stage having been reached, another subject of controversy arose on the point whether, after the death of the nominal purchaser, parol was admissible to prove a resulting trust. The negative of this last proposition has been maintained by able lawyers (1 *Saunders on Uses and Trusts* 354; *Roberts on Frauds* 99), while in *Hill on Trustees* 95 it is guardedly laid down that, "Upon the whole, the preponderance of authority seems to be in favor of the admissibility of parol evidence to support a resulting trust, as well after the death of the nominal purchaser as in his lifetime, although the purchase deed expressly state the money to be paid by the nominal purchaser;" but the author carefully adds, "however, it is to be observed that where the evidence is merely parol, it will be received with great caution, and the court will look anxiously for some corroborating circumstances in support of it; and in

cases of this nature the claimant in opposition to the legal title should not delay the assertion of his right, as a stale claim would meet with little attention." And last of all came the question as to the lapse of time and the operation of the statute of limitations in defeating the execution of a trust. On this point there is some discrepancy of opinion among the authorities, the only well-recognized principle being that where the trust is created merely by implication or construction of law, the plea of lapse of time will be more readily admitted as a bar to any claim by the *cestui que trust* than in the case of an express trust. (*Hill on Trustees* 265.)

After this cursory review of the law defining the elements of and the incidents to a resulting trust of the nature claimed by the complainant, the inquiry may now be made, Has he furnished a sufficient proof of facts in support of a trust to entitle him to a decree in his favor?

The evidence produced by him to establish this part of his case may be arranged in the following order:

1. Entries on the books of Hollingsworth, Harvey & Co., made by Achilles Hollingsworth, and as such, being admissions that the purchase was made with the funds of the firm, and for its use and benefit.
2. The occupation of a principal portion of the property by the firm from and soon after the time of purchase as adapted to and fitted for their business, and the absence of any claim or charge for the rent of the same by Achilles Hollingsworth.
3. The paper A, in the handwriting of Achilles Hollingsworth, setting forth a statement of the assets and liabilities of the firm, and including the estimated value of the real estate as a part of such assets.
4. The testimony of Messrs. James Hollingsworth, Teas, and Valentine, and of Mr. Patton.

1. The first entries on the firm books in which mention is made of real estate are under the date of December 31st, 1849, and are as follows:

Achilles Hollingsworth (for real estate) Dr.

To cash for ten hundred and four dollars which he paid to Isaac Grubb, Sheriff, in October last, being ten per cent. of the purchase-money on the property late of James Hollingsworth and Joseph Teas, which he purchased at sheriff's sale in August last, ...	\$1,004 00
For ten dollars paid interest on the above account for sixty days, ...	10 00
For eleven 50-100 dollars paid Thomas J. Mahaffy, tax against Hollingsworth and Teas property, ...	11 50
For sundry expenses to New Castle, ...	3 50
For three dollars paid Isaac Hollingsworth for fastening up shop, ...	3 00
For nine dollars and twenty-six cents paid insurance company, October 14th, last, ...	9 29
For two dollars and twelve cents paid Biddle, Prothonotary, ...	2 12
For twenty dollars paid Mrs. Ann Billany, for interest on bond, ...	20 00

It is contended, on the part of the complainant, that these entries conclusively fix the character of the transaction to which they relate, and are equivalent to acknowledgments by Achilles Hollingsworth that the real estate was bought with the money of the firm and for the firm. In support of this interpretation of their meaning, the testimony of five witnesses, who were examined as experts in the science of bookkeeping, was offered, and they, without exception, were of the opinion that the entries indicate that the real estate was bought for the firm by Achilles Hollingsworth, and that it was a "real estate account" and "a firm account." One witness says, "A. H. was the agency through which the transfer of cash was made to the sheriff." The same witness adds: "From the connection of A. H.'s name alone with the entry, it tends to complicate it. From a bookkeeper's standpoint, I can see no object of associating the

name of A. H., except to set forth the fact that he was the agent of his firm in the transaction" * * * * "personal transactions are never properly attached to partnership accounts." (*W. G. Gibbon's test.*, p. 76.) On p. 81 of complainant's testimony, Mr. Woolley, a well-known accountant, says: "I have examined all the accounts and original entries referred to in the interrogatory. The nature of the account in my opinion is real estate belonging to the firm." On cross-examination he admits that a private venture in real estate by one partner on his individual account might be kept on the firm books with the consent of the firm, and that the entries A. B. (the individual member) for real estate Dr. to Cash, and Cash Dr. to A. B. for real estate, would be the proper ones, and would apply to money borrowed from the firm from time to time to pay liens, interest on liens, repairs, taxes and insurance, and to money received for rents from portions of the real estate. George W. Elliott is equally positive that "these entries clearly indicate firm property" (p. 95), and J. Groesbeck, another expert, says: "Most decidedly, it is the firm's business, and that includes the ownership of the real estate. These entries signify firm's real estate" (p. 106). The last two witnesses agree that an individual account of a real estate venture may be kept on the firm books with the consent of the firm.

J. Taylor Gause is the first witness produced on the part of the defendants as an expert, who, to use his own words, has "had a good deal to do with the science and practice of double entry bookkeeping since 1843." He testifies that the account as opened on the books is perfectly correct and proper. "I consider it an individual account with the firm." "I have examined several of the entries as posted on folio 37, and find charges for interest paid on liens against the property, repairs done to buildings, rents collected, all of which indicate that A. H. was the owner of the property." He also says that it is consistent with the science of double-entry bookkeeping for a member of a firm to have a dozen accounts, if the nature of the transactions require them. Eli Garrett has been concerned in bookkeeping since 1855. In his judgment the entry in Book D signifies that "Mr. Hollingsworth was the owner of that real estate—this is the

story of the transaction;" and that it is not inconsistent with correct bookkeeping for a member of a firm to have two or more accounts on the firm ledger. He keeps several such accounts. In addition to Messes. Gause and Garrett, five other practical bookkeepers testify as decidedly and directly to the same effect. These entries are mostly in the handwriting of Achilles Hollingsworth, who had charge of the books, which were at all times during the existence of the partnership subject to the inspection of all the partners. What, then, do they mean? If there was no other testimony in the cause, would they be sufficient to sustain the charge that the real estate was bought for the firm and belonged to the firm? Clearly, not; and this conclusion is confirmed by the testimony of Charles S. Robb, whose veracity, although it has been seriously questioned, has not been successfully impeached, and who, as far as we may judge from the papers filed in the cause, is entitled to equal credit and consideration with the other witnesses whose testimony has been admitted. He was in the employ of the firm as an apprentice as early as 1853, and was afterward engaged as bookkeeper from 1856 or 1857 to 1865, that engagement ceasing in September, after the death of Achilles Hollingsworth. Mr. Harvey gave his attention to the mechanical part of the business, while A. Hollingsworth acted as financier and correspondent. Mr. Rice was not known to Robb as a member of the firm. Mr. Harvey had the same access to the books that Mr. Hollingsworth or witness had and frequently examined them. In 1865, sometime after the death of Mr. Hollingsworth, Mr. Harvey took the books and papers of the firm to his private residence. The important part of the testimony of this witness is, that he was directed and instructed by Mr. Harvey, in the latter part of July or August, 1865, to make a settlement of the partnership accounts upon the basis that all the expenses connected with the real estate should be charged to Mr. Hollingsworth, and that all the rents for the same which had been received by the firm should be entered on A. H.'s real estate account, together with the old boiler and shafting that had been taken out at or about the time of the purchase; and that A. H.'s real estate account should be credited with six hundred dollars per annum for rent

of that portion of the property occupied by the firm in carrying on their business.

Robb further testifies that during the lifetime of A. H., "Mr. Harvey has paid to me to be handed to Mr. Hollingsworth as his property rents from this real estate in controversy. That occurred often. It was always understood to be his property." (*Deft.'s test.*, p. 16.) On this point of the receipt and appropriation of the rents, Robb does not stand alone. Jarrett Megaw, who was in the employ of the firm for many years, and part of the time as the special agent of James Rice, says that "when rents were paid I would receipt in the name of Mr. Hollingsworth and hand it over or put it in the fire-proof and report to him that I had collected so much. I signed the receipts 'A. H. per Jarrett Megaw.' " (*Deft.'s test.*, p. 50). Finally, on the sale of the firm's personal property to Megaw & Billany for seventeen thousand dollars, Mr. Harvey said, according to Robb, that the surplus, after paying the debts of the firm, would be to divide, and that he did hand over to W. G. P., the executor of A. H., a bond of Megaw & Billany for some four thousand dollars, on account of what might be due him as executor from the proceeds of sale. (*Deft.'s test.*, p. 19.) There is nothing at all improbable or unreasonable in what Robb has said of the instructions, conversations, and actions of Harvey, nor does his testimony appear to have been successfully contradicted or impeached.

Now, if Robb's statements are worth anything, and are taken in connection with the testimony of the defendants' experts and with the intrinsic evidence of the book entries, the conclusion is almost irresistible that the real estate account was the individual and personal account of Achilles Hollingsworth. In corroboration of Robb are the undisputed facts that at the time of the purchase Achilles Hollingsworth paid to the sheriff only ten per cent. of the purchase-money in cash; that before the sale, the property had been subject to a number of liens, but no money over the ten per cent. was paid to the sheriff or applied to the liens, and that on the 28th of December, 1849, Achilles Hollingsworth gave his own bonds and mortgages, in substitution of the liens as they stood in priority, up to the amount of the purchase-money—ten thousand and forty-nine dollars

and sixty-four cents. These bonds and mortgages were as follows:

To the Wilmington Savings Fund Society, ...	\$ 2,400 00
To Ann Billany, ...	700 00
To Delaware Fire Insurance Company, ...	450 00
To Farmers' Bank, afterward ass'd to Sav'gs Fund Society, ...	2,100 00
To McDaniel & Harvey, afterward ass'd to Jesse Lane, ...	1,800 00
To John Rice, a judgment bond, ...	1,595 64
	<u>\$ 9,045 64</u>
Which, with 10 per cent., ...	<u>1,004 00</u>
Makes the entire purchase-money, ...	\$10,049 64

About three thousand dollars of the principal of these securities was paid off during the lifetime of Achilles Hollingsworth for the most part out of the partnership funds, and charged to his real estate account, together with the interest as it became due, and after his death the sum of one thousand nine hundred and fifty dollars was paid out of his estate, leaving a balance of four thousand dollars still unpaid, and for which his estate is liable.

2. The possession and improvement of a large portion of the property by the firm are relied on to prove the equitable ownership of H., H. & Co. But neither possession nor outlay for improvement can avail against the payment of rents and Robb's testimony. The expenses for repairs and alterations were charged against the real estate account of A. H., and the rents of the dwelling-houses placed to his credit, while on the settlement of the partnership affairs by Harvey's direction the estate of A. H. was to be allowed six hundred dollars per annum for the use of the shops and buildings occupied by the firm. From whichever side then these accounts may be examined, they either prove title and estate in A. H. or they leave the question of ownership so much in doubt as to prevent a clear under-

standing of what they do mean. There is no doubt that use, occupation, and outlay of money for permanent improvements without payment of rent or its equivalent may be, under some circumstances, presumptive evidence of ownership or of interest in the property beyond that of a tenant. Here, however, the legal owner was the active partner, financier, and bookkeeper of the firm. The books are admitted to have been carelessly kept, the firm was declining toward insolvency for several years, no balance sheet was taken off, and A. H. may have thought that there would be time enough to make charges for rent when the firm had settled with and paid off its outside creditors. Be this as it may, Harvey, the surviving partner, and who ought to know the history of the firm's business, directed that the yearly rent of six hundred dollars should be credited to the account of his deceased copartner, A. H.

3. The next matter relied on to prove the trust is the paper A, containing what is claimed to be an exhibit, in the handwriting of Achilles Hollingsworth, of the liabilities and assets of the firm, including among the former the mortgages and liens against A. H., and among the latter the estimated value of real estate. This paper is without date, signature, or *indicia* of any kind to explain its true character and purpose, which are thus left to conjecture. Chancellor Bates, in his opinion in the first case of Harvey against his two co-defendants in the present suit, in endeavoring to reach a solution of its meaning, says: "There is nothing whatever on the paper or any collateral evidence to show the occasion or object for which this statement was made."

* * * "We must rather conclude that at sometime while there remained an expectation that the firm would take the property, or pending some proposal to that end, this statement was made in order to show in what condition the assumption of the property by the firm should it be taken would place its liabilities and assets: Its form and appearance indicate that it was made for some transient use or purpose which was not effectuated; for we can hardly suppose that any statement made as an exhibit of the firm's interest in this real estate and of its liability for its liens would not have been entered on its books. Further, the statement, in addition to the mortgage against Hol-

lingsworth, includes also a debt to be added to the original debts of the firm, a mortgage of four hundred dollars to Robert E. Poole, a mortgage which had no connection with this real estate. The presence of this mortgage alone demonstrates that the statement was made in contemplation of some arrangements then executing and not afterward carried into effect. For it is certain that the firm did not in fact by proper conveyances take this property or assume the liabilities set forth, nor did they at any time cease to charge Hollingsworth with payments made on account of the liens. There may have been some omissions to charge him, but they must be treated as accidental."

The defendants' counsel assigns another, and, perhaps, equally natural and reasonable cause for the existence of the paper: "Mr. Hollingsworth's purpose was evidently to show that with what the firm had and what he had, he, as the financial member, could probably meet its liabilities if an extension was granted." It would not be the first or only instance of a member of a quasi insolvent firm contributing his individual property and credit to sustain the sinking fortunes of a partnership. Thus it is seen that at every stage of the investigation of this case the pathway, instead of becoming more open and leading more directly to the point on which the complainant depends to establish his charge, is, as we advance, more and more beset with difficulties, uncertainties, doubts, and conjectures, for the burden of proof is on him by clear, full, and satisfactory evidence to engraft upon the legal title of Achilles Hollingsworth a trust in favor of Hollingsworth, Harvey & Co.

4. The testimony of Valentine, Teas, and James Hollingsworth throws no additional light on the original transaction which has given birth to this suit. They speak of no facts that bear directly on the question. Their impressions, besides being too vague to depend on, are not evidence. Teas mentions conversations between Achilles Hollingsworth and James Hollingsworth in reference to the purchase of the real estate, both before and after the sheriff's sale, of which J. Hollingsworth has no recollection. Their impressions were, at the time of the sale, that the property was bought for the firm. Not one

of them can testify to the actual fact. Everything is indefinite. They refer to acts, expressions, and events which occurred more than twenty years ago, and after the lapse of so much time it would be perilous indeed to place any reliance on the mere impressions left upon the minds of the witnesses after the facts which created them have been totally forgotten or are but dimly remembered. The facts, if they could be recalled with certainty and distinctness, might bear a very different construction from the one now sought to be attached to them. Facts can be investigated and explained—impressions cannot; and Sir William Grant, in *Lench v. Lench*, 10 Ves. 517, declares that to be the most unsatisfactory evidence which can be fabricated with facility and is incapable of contradiction. Mrs. Patton's memory is equally unreliable. She was a tenant of one of the dwelling-houses, and the rent (one hundred and twenty dollars) was set off against the annual interest of a debt of two thousand dollars which H., H. & Co. owed to her husband's estate. A. H. negotiated the business with her. Wishing to buy, she inquired of A. H. what he would take for the house, and he replied that they would sell it for one thousand eight hundred dollars, but that they could not give a good title. On further examination, she was uncertain as to the expression used, whether he said "clear title" or "good title," and whether he spoke for himself or for the firm. It is very apparent that, with incumbrances to the amount of nine thousand dollars on the whole property, it might not have been convenient or feasible for the legal owner to convey a clear title to any portion of it, even on the most tempting offer.

Though there is not the slightest ground for questioning the good faith of any of the witnesses, the evidence, on the whole, is contradictory, uncertain, and defective, and does not come up to the full measure of proof required. It will bear more than one construction and is capable of supporting more than one theory. Robb, whose testimony has been freely criticised, is corroborated again and again by Megaw, who says that, after the separation of the personal from the real estate of H., H. & Co., and the sale of the former to Megaw & Billany, the last-

named firm rented the shops and buildings from Mrs. Hollingsworth, and this with the consent, or, at least, without protest from Harvey. Megaw had been in the employ of both the first and second firms of H., H. & Co. during the existence of each.

The chancellor, in dismissing the bill, adopted the view of his predecessor in office, and interprets the meaning of the book entries to be that A. H. borrowed the purchase-money from the firm, charging himself with the sums taken from the partnership funds for that purpose, and also with the moneys taken from time to time to pay off liens, interest, repairs, etc., and thereby became a debtor to the firm for the amounts so charged. Chancellor Bates, in the Harvey case, thought that the real character of the payments was that of a loan to Hollingsworth, for which the firm became not *cestuis que trust* of the real estate but creditors, and that the firm could not be both the owner of the real estate and Hollingsworth's creditor for payments made on account of it.

Why the purchase was made by A. H., and title taken in his name, while the main object seems to have been to benefit the firm by change of location and increased facilities for doing business, may be accounted for in the common experience of partnership concerns. Members of a firm do not always and at once agree upon what is best for their joint interest, and an individual partner, with clear foresight and strong convictions, may determine to assume a responsibility in which his partners refuse to unite; and it is doing no violence to admitted facts to suppose that A. H. may have bought the real estate under such circumstances with the design of having the firm profit by the transaction in the use of the shops and buildings, and with the expectation, also, that the firm would take the real estate off his hands, or, at least, so much of it as should be occupied by them, whenever the partners should consider it to their advantage to do so. But assuming this state of facts to be true, it would by no means leave it *optional* with the firm, or a surviving partner, or the representative of a deceased copartner, to set up a trust, either before or after the death of the legal owner.

But to recur to the law. The doctrine of resulting trusts

being deemed "questionable," "dangerous," and as "one of the mistakes of equity," except where fraud is alleged on the part of the purchaser named in the deed, it is most reasonable to require that the burden of proof should fall upon him who attempts to set up the trust, and that the evidence in support of such claims should be clear, full, satisfactory, and convincing; and that after the lapse of many years and the death of the nominal purchaser, still greater caution should be exercised in admitting and weighing the evidence. All the authorities are at one as to the high standard of proof necessary in such cases. The evidence must not only be distinct and credible, but preponderate, and if it does not the presumption is in favor of the party who has the deed. The payment by the claimant must be proved explicitly, and not be a mere inference or deduction from facts and circumstances. (46 *Mo.* 423; 13 *P. F. Smith* 229; 2 *Md.* 366.) After the legal title has once passed to the grantee by deed, it is impossible to raise a resulting trust so as to divest that legal estate by the subsequent application of the funds of a third person to the improvement of the property or to satisfy the unpaid purchase-money. The resulting trust must arise, if at all, at the time of the execution of the conveyance. (*Rogers v. Murray*, 3 *Paige* 390.) In *Forsyth v. Clark & Stewart*, 3 *Wendell* 937, it was held that the appropriation of the joint funds of a copartnership by one of the members of a firm to the purchase of real estate conveyed to such partner in his own name will not create a resulting trust in favor of his copartner, unless the funds were so appropriated in pursuance of an agreement between the parties at the time of the purchase. In that case it was alleged that Clark had purchased certain real estate with funds belonging to Stewart, and that by operation of law there was a resulting trust to Stewart in the property. In commenting on the evidence, Mr. Justice Marcy says: "It is said Stewart furnished the funds with which Clark made the purchase. This assumption is not borne out by the facts of the case. Clark, in the first instance, used no funds for that purpose; his own bond was substituted for the payment of the consideration money. In discharging the old incumbrance, he used no funds, for that was done by giving his individual bond

and mortgage to Roberts. If he afterward appropriated the funds in his hands, belonging jointly to himself and Stewart, to discharge the obligations which he had in the first instance laid himself under in making this purchase, a resulting trust would not be thereby created unless it was unequivocally shown that there was an agreement at the time of the purchase that these funds should be so appropriated." The evidence in that case was much stronger in support of a trust, not only from the circumstances surrounding the purchase, but in the proof of fraud, than in the present one, and yet the court affirmed the decree of the chancellor dismissing the bill. The analogy between the two cases is still more remarkable in the difficulty which the court finds in the cited case of accounting for the disposition of the rents which were carried to the credit of Clark & Co. on the books of the firm, and the remarks of Justice Marcy in that connection may be applied with great appropriateness to the paper A, to which so much weight has been given. "When exploring transactions suspected to be fraudulent," says the learned judge, "it often becomes necessary to build our conclusions upon an accumulation of circumstances, and such conclusions are strong or weak according to the number and character of the circumstances by which they are sustained. Circumstances which are inconsistent with one state of facts do not, however, necessarily prove another state of facts with which they may be made to harmonize. Combine those which this case presents to us as we may, doubts and difficulties, I apprehend, will arise as to the simple question whether Stewart was a joint purchaser with Clark of the west half of the old Ton-tine Coffee House. Most of the pretenses that have been set up in opposition to such a conclusion have been scattered, yet competent proof is still wanting to create in the mind a confident reliance on its truth." The opinion of Judge Story, in *Hoxie v. Carr et al.*, 1 Sumner, cited by complainant's counsel, does not controvert any of the foregoing authorities. The evidence there was not defective. Real estate, bought with the partnership funds, had been conveyed to the several partners in their individual names, and the property thus purchased was almost immediately occupied, used, and improved for the part-

nership business. There was no entry in the firm books of any charges for the real estate against the several members as upon a purchase made on their individual accounts. On the dissolution of the firm, which was heavily in debt, the question arose whether the real estate belonged to the several partners as tenants in common or was to be held as partnership assets. One of the partners had undertaken to sell his share of the realty to the defendants, and the latter declared that they had purchased without notice either express or constructive, that it was partnership property. The only defect in the proof was as to the knowledge of the defendants at the time the conveyance was made to them of the true situation of the firm's affairs, and of this there was strong presumptive proof. Judge Story says: "Some things may, in the present discussion, be assumed as settled, because both upon principle and authority they may now be treated as reasonably free from doubt. In the first place, property purchased with partnership funds does not of necessity become partnership property if that is not the intention of the parties, at least in all cases steering wide of fraud and breach of trust. One partner may certainly withdraw a part of the partnership funds for a separate purchase on his own account, and all may join in a purchase of real estate for purposes wholly independent of the partnership, intending to hold their shares severally on their individual account." The proof, however, of the partnership purchase in that case was too clear and direct to be resisted, and the court, although not finally deciding the cause, on account of the want of proper parties to the bill, intimated what the decision would be. In *Le Fevre Appeal*, Judge Sharswood says: "Partners have an unquestionable right to deal with the funds of the firm as they please; and if with their consent or knowledge or acquiescence a portion of their funds is applied to the purchase of real estate in the name of an individual member and as his private property, there is in such case no resulting trust. He is charged or chargeable with what is so withdrawn and appropriated in account. So if with the knowledge and consent of all the partners partnership funds are applied to the improvement of the real estate of one or more members of the firm." 69 *Penna. S. Rep.* 122.

The opinions of these eminent judges and the adjudged cases before cited all concur in recognizing the right of a partner to apply the partnership funds to his individual use with the consent of his copartners, and that a separate account of his individual purchases and speculations may be kept in the books of the firm; and they also exhibit in a very clear light the great danger of admitting uncertain, equivocal, and purely circumstantial evidence to overthrow a deed or to engraft upon the legal title a trust which perhaps may never have been contemplated by any of the parties. Here there is so much to excite doubt about the true history of the sheriff's sales on the 18th of August, 1849, from the absolute failure to prove any agreement or understanding between the copartners, as alleged in the bill (this court being unanimous in ruling out Harvey's deposition), and by the reflection that the only support for the claim now made is on the book entries, the occupation of a part of the premises by the firm, and the paper A, each and all of which may be and are subject to different and opposite constructions, that it would be extremely hazardous, after the lapse of so many years from the day of sale, and after two of the three copartners have long since died, to make a decree establishing a resulting trust. The difficulty of coming to such a conclusion is increased when it is considered that James Rice lived for several years after his withdrawal from the firm, and though out of business and insolvent, made no demand for any share or interest in the real estate during that time, nor informed any one that he was entitled to such interest; then came the complainant who as the legal representative of James Rice, was empowered to demand and compel a settlement of the partnership affairs and to receive what might have been found due to his intestate, and yet he slept on this claim until 1873, making in all nineteen years from the dissolution of the first firm of H., H. & Co., and upward of twenty-four years from the day of the sheriff's sale. During all this time the actors in the original transaction were passing away and the memory of the survivors becoming more oblivious and uncertain, until at this late day it is attempted to set up a trust unsupported by written proof, and depending on evidence which, viewed in the most favorable

light for the complainant, reasonably admits of a conclusion that defeats his claim.

This leads us to the second branch of the defense—the plea of the statute of limitations.

Although a court of equity is said to be exempt from the compulsory force of the statute, and the operation of the bar is not governed by the same uniform and inflexible rules which prevail in actions at law, yet that court, acting in analogy to the statute, will in a proper case, after the expiration of a great length of time, refuse to enforce a claim which, without neglect, could have been sooner made. Where fraud enters into the transaction, the statute does not run except from the time of its first discovery, or when with reasonable diligence, it might have been discovered. The principles upon which equity applies the statute are here stated within the narrowest limits, for courts of equity have gone so far as, in every case free from fraud, to give the same effect to the statute as is done at law. The policy of the law is, for the welfare of the community, to fix a barrier to litigation, to render individuals secure in the undisturbed possession of their property, and for these objects to extinguish dormant claims. Another reason for the enactment of the statute was found in the difficulty of doing entire justice when original transactions have become obscure by time and the loss of evidence. The statute having been enacted on these grounds, there would seem to be no good reasons why, in the administration of justice, there should be any difference between the courts of equity and the courts of law in the operation of the bar, except in cases of fraud or of peculiar hardship, relief from which it is the special province of equity to afford.

In Delaware an action at law for the recovery of land must be brought within twenty years from the time when the cause of action accrued. *Amend. Stats.* 727. In applying the statute here, a distinction is to be observed between an express trust, constituted by the act of the parties, and a resulting trust, which is created by implication or construction of law. As between trustees and *cestui que trusts*, an *express* trust will not be barred, because in such cases there is no adverse possession, the possession of the trustee being the possession of the *cestui que trust*;

but where the trust is a resulting one, the lapse of time will be more readily admitted as a bar to any claim by the *cestui que trust* against the trustee. "In such cases the possession of the trustee is usually to a certain extent adverse to the *cestui que trust*; for it rarely happens that such a trust is expressly recognized or admitted by the parties. Though in strictness the statute of limitations can scarcely be said to apply to these equitable cases, court of equity have always admitted the validity of a defense founded on the analogy of the statutes, and have refused relief where a party with full knowledge, or being in a situation to have full knowledge, of his rights, has delayed for twenty years to prosecute his claim. On more than one occasion a delay of eighteen years in enforcing a claim founded on a constructive trust has been held a sufficient reason for dismissing the bill." *Hill on Trustees* 265. In *Angell on Limitations*, chap. 16 *et seq.*, it is said: "Where the trust, however, is merely *implied*, or constructive, there has been some disagreement among the cases, but the better opinion appears to be that, as in general the facts out of which such trust arises from their very nature presuppose an adverse claim of right on the part of the trustee by implication, from the beginning the statute will commence to run against the *cestui que trust*, from the period from which he could have vindicated his right of action or otherwise." (See *Hill on Trustees* 264, note 2.) In *Strimpfler v. Roberts*, 18 Penna. S. Rep. 283, Chief Justice Black says the doctrine of resulting trusts is not to be favored in ordinary cases, and that a trust resting in a parol is taken to be extinguished after twenty-one years; that "the whole doctrine is a violation of the sound principles on which the statute of frauds is placed and ought not to be favored except when the trust originated in the bad faith of the nominal purchaser. The extension of it to cases in which the *cestui que trust* has voluntarily placed his rights in such a condition that he can only establish them by parol is of doubtful policy, and, like other departures from the statute of frauds, has probably done more mischief than it has ever corrected." * * * "No man," says Mr. Justice Sergeant, "ought to be permitted to lie by while his rights can be fairly investigated and justly determined

until time has involved them in uncertainty and obscurity and then ask for an inquiry. For such reasons as these it is that every civilized society has fixed a limited time within which all rights must be prosecuted. Where this is not done by positive enactments of the legislature, the judiciary calls in the aid of presumption; and courts of equity, though not bound by the statutes of limitations, close their doors against stale demands as sternly as the courts of law." * * * "Courts of equity will not listen to claims so old that they would be barred at law by the statute of limitations. If this rule, which is in itself so just and wise, needed the authority of great names to support it, Lord Talbot (3 *Atkyns* 325), Lord Redesdale (2 *Schy. & Lefroy* 71), Chief Justice Marshall (10 *Wheaton* 152), Chancellor Kent (3 *Johns. Chy.* 129), and Judge Storey (1 *Eq. p.* 529) ought to be sufficient for the purpose."

The principles to be drawn from these authorities are too obvious,—and their application to this case are too apparent, to need elaboration. The decisions in England and the United States on the effect of the lapse of time in defeating ancient demands are uniform and conclusive almost without exception. Courts are always reluctant to overthrow written titles and legal estates by parol, or to encourage litigation by listening to stale claims, more particularly after the death of the party whose actions are brought under review, and who, if living, could perhaps explain them in such a way as to remove all cause for controversy.

There was no fraud in the manner of making title by A. H.; it was done with the knowledge of the firm as the bill admits; nor are there any circumstances of peculiar hardship in the complainant's case on his own showing to entitle him to relief. But, it has been replied that this case is taken out of the operation of the statute by the book entries made in the handwriting of Achilles Hollingsworth up to or near the time of his death, in 1865, and which constitute so many admissions by him that he was the trustee of the firm. This, however, even if sufficient for that purpose, is the assertion of a fact which has not, in my judgment, been satisfactorily proved. It is taking for granted that the evidence has established the fact that the personal account of A. H. is a firm

account, and that each entry on the debit or credit side having reference to the real estate is an acknowledgment that the equitable title to the property is in H., H. & Co. Neither the books, nor the contradictory opinion of the experts in relation to their meaning, or any circumstance proved in the depositions, warrant that assumption. The trust, if there was one, commenced on the day of the sale, or, at the latest, on the 29th of December, 1849, the date of the execution and delivery of the deeds, and there being no element of fraud or of peculiar hardship to prevent the operation of the statute, the complainant's claim is barred.*

For these reasons, I am of the opinion that the chancellor's decree, denying the claim of a resulting trust as well as the other demands made by the bill should be affirmed.

*The chancellor having decided that the trust was not sustained by adequate proof, did not, in his opinion, consider the plea of the statute.

SUPERIOR COURT.

FALL SESSIONS.

1877.

SAMUEL HARGADINE, Sheriff, v. PRESSLY FORD.

In an action of trover by a sheriff against a tort-feasor for the taking and conversion of goods levied on by him under an execution in his hands, and on which he afterward by mistake returned the goods as sold by him, his return may be contradicted by him, and he is not estopped or concluded by it from proving the taking and conversion of the goods. For his return to the writ in such a case as a matter of record in the court does not import absolute verity, but is only *prima facie* true and may be contradicted.

The usual inventory and appraisement made by a sheriff in levying a *fi. fa.* execution on goods and chattels constitutes such a constructive seizure and possession of them by him as sheriff from that time, and before any appraisement has been made of them by two sworn appraisers afterward, as to give him such a special property in them as will enable him to maintain an action of trover against a tort-feasor for the tortious taking and conversion of them between that time and the appraisement of them made afterward by the two sworn appraisers. Or, in other words, that the inventory and appraisement of them made by the sheriff in the first instance constitutes a sufficient levy on them when there has been no actual seizure of them by him to give him such a special property in them before the appraisement of them by the two sworn appraisers afterward.

THIS was an action of trover, by the plaintiff, as sheriff of Kent County, against the defendant for the undivided half part of a crop of wheat, the share of John W. Hubbard, as tenant, already harvested on the premises rented by him, and levied on by the sheriff under a *fi. fa.* execution in his hands against him, and carried away and converted to his use by Pressly Ford, the

defendant in the suit, before the day advertised for the sale under the process with the privity and consent of the defendant in it.

The execution was issued on the 9th day of July, 1872, and the first entry indorsed on the back of it in the handwriting of the sheriff's deputy was, "An inventory and appraisement of the goods and chattels of John W. Hubbard, seized and taken in execution by virtue of the annexed writ at the suit of Alexander Peterson's executor, this 9th day of July, A. D. 1872, by Samuel Hargadine, Sheriff." Then followed a schedule of the same with their respective valuations set opposite in figures, amounting in the aggregate to two thousand one hundred and forty-three dollars, in which was included "lot of wheat in stock, crop of 1872, valued at three hundred dollars," and which was followed with the signatures of the appraisers at said prices, dated August 31st, 1872; and this was followed by the sheriff's return indorsed on the execution, "Levied on goods and chattels as per inventory and appraisement annexed, and on the 18th day of September, A. D. 1872, after due notice given as by law required, the said goods and chattels sold for the sum of eight hundred and seventy-three dollars and thirty-five cents."

John Mustard, the first witness called for the plaintiff, was asked by the counsel for the defendant if he was not one of the sureties in Sheriff Hargadine's official recognizance taken on the 23d day of April, 1872, and before this suit was brought, which had been pending for several terms, and on his answering the question that he was, he objected to his competency as a witness on that ground, for which he referred to the general rule of evidence which renders any one incompetent to testify who is interested in or may gain or lose by the result of the case.

The Court, however, overruled the objection, after argument by counsel on both sides.

The counsel for the plaintiff was then proceeding to prove by the witness the carrying away of the wheat from the premises after the issuing of the execution and it had been levied on by the sheriff, when

H. Pennington, for the defendant, raised the further objection that by the sheriff's return it appeared that the wheat was both

levied on and sold by the sheriff pursuant to due notice given as required by law, with the other goods and chattels of the defendant in the execution levied upon, on the day advertised for the sale, the 18th of September, 1872, and if the object of the testimony was to contradict that return of the sheriff in any substantial particular, it was not admissible, because the sheriff himself is the plaintiff in the suit and is concluded and estopped from impeaching or denying his own return when he is a party to the action. (3 *Bac. Abr.* 553; *Purington v. Loring*, 7 *Mass.* 388; *Townsend v. Olin*, 5 *Wend.* 207; *Armstrong v. Garrow*, 6 *Cow.* 465; *Gardner v. Hosmer*, 6 *Mass.* 325; 2 *Stark Ev.* 1017; 2 *Phil on Ev.* 225.)

J. R. Nicholson, for the plaintiff: A sheriff's return is not held to be conclusive because it is a judicial record and imports absolute verity, for it is not such a record, but simply because of its legal effect as between the parties and privies to it. (*Wats on the Law of Sheriff*, 7 *Law Libr.* 120.) But in other cases it is only *prima facie* or presumed to be true and the contrary when it is untrue may be shown. *Bailey v. Capelle*, 1 *Harr.* 449; *Barham v. Massey*, 5 *Ire.* 192; *Patterson v. Britt*, 11 *Ire.* 383; *Simpson v. Hiatt*, 13 *Ire.* 470; *Boynton v. Willard*, 10 *Pick.* 165; *American Bank v. Dolittle*, 14 *Pick.* 123; *Diller v. Roberts*, 13 *S. & R.* 60; *King v. Russell*, 40 *Texas* 125; *Ayres v. Duprey*, 27 *Texas* 593.

Massey, for the plaintiff: There was in this case a tort committed by the defendant, who was a stranger and no party to the judgment or the execution process or official proceedings in the hands of the sheriff, against the right and property of that officer in the wheat which had been levied on by him. The general principle of law is well settled and will not be disputed by us, that when the action is against the sheriff, as for a false return to a writ in an action against him for it by the plaintiff in it, or the action is against any one claiming by or under his return, the sheriff or such claimant cannot contradict the return but is absolutely bound and concluded by it. And in such a case there are considerations and obligations of good faith and

public credit which require this for the protection and security of those whose legal rights are dependent upon them. *Baker v. McDuffie*, 23 *Wend.* 389. But for a mere tort-feasor or wrong-doer who volunteers without any pretext or color of right whatever to seize and carry away property levied on by such an officer, it has no consideration and no application whatever. And, therefore, in all other cases than those first alluded to the return of a sheriff to a judicial writ is but *prima facie* proof of the allegations contained in it, and may be contradicted and corrected by evidence to the contrary when erroneous and mistaken. And more particularly is such the rule when the defendant, as in this case, was a mere trespasser or tort-feasor and acquired no right or title whatever to the wheat under the return as against the sheriff, the plaintiff in the action. In the case which he had just cited from 23 *Wend.* 289, the law on the subject is well and concisely stated in the syllabus of it. A sheriff is generally concluded by his return upon process from gainsaying its truth collaterally, but he is so concluded only when his return is set up by a party who may claim something under it; if others rely upon it as his admission it is but *prima facie* evidence and may be explained. And *Herman on Executions*, sec. 243, states it to the same effect. In certain cases a return is but *prima facie* evidence of the matter therein contained; in actions between third parties where the matters returned come collaterally in issue, and where the interests are not connected with the action in which the return was made; in actions of trover or trespass by an officer for goods levied upon by him, or for an injury thereto, his return is *prima facie* evidence of his levy and possession, but not conclusive in such a case.

J. B. Penington, for defendant; The sheriff's return is a part of the record of the court in this case, and he now asks to show that it is not true, or, in other words, to contradict it, and it is admitted that as a general rule that it cannot be done. It was contended on the other side, however, that the principle does not apply to a mere tort-feasor in an action against him by a sheriff for wrongfully taking away and converting to his own use the goods of another levied on by him, but that does not

appear in the case as thus far presented to the court, and if the return of the sheriff is true it is a matter of impossibility that it ever can appear to the court. It therefore seemed on their part to be begging the question itself. He reviewed and commented upon the authorities cited on the other side and contended that this case differed from them all in the striking and unexampled fact that in an action brought by the sheriff against an entire stranger to the process to recover goods levied on by him, he has at the very outset to contradict his own return upon it, and the evidence of his own making, to maintain the action against him, which he was well convinced could not be done.

The Court: If the controversy were between the sheriff and a party or privy to the writ, his return which he proposes to contradict, we should not admit the proof offered, for a return by the sheriff on execution process is not to be contradicted by him in an action against him by the plaintiff in the writ or by any one claiming in privity with him. And in all collateral proceedings the return is generally to be taken as absolutely true also. But this is not a case between the sheriff and a party to the writ, nor between him and any other party who founds any claim of title upon the writ and return; but it is between the sheriff and a tort-feasor, who, it is alleged, took the goods levied upon and converted them to his own use wrongfully. It would be, as we conceive, flagrantly unjust to aid the defendant in defeating this action by yielding to his objection that the return of the sheriff estops him from proving that the goods converted by the defendant were not in fact disposed of by the sale under the writ, and standing in this suit as he does, he ought not to be allowed any advantage with respect to the return other than that it is to be taken, even with reference to a mere wrong-doer and a stranger to the writ, like any other mere admission, as *prima facie* true, subject, however, to be rebutted by counter-vailing evidence. The fact is, in this case the sheriff made a palpable mistake in the return, all the goods levied on except the wheat wrongfully carried away and converted by the defendant before the day of sale having been sold by him at the sale. We cannot conceive that any violence will be done to the rules or

the law of evidence properly applicable in such a case as this by allowing him to do so. We, therefore, overrule the objection and admit the evidence offered. The return is but the certificate of an official and ministerial act performed by the sheriff out of court in obedience to the command of the writ, and although it is afterward transferred to and entered in the record of the case in the court, it has not in a case like this the peculiar sanctity attached to the pleadings and judicial proceedings transacted and recorded in it, and does not always, like them, import absolute verity.

The counsel for the plaintiff then proceeded and proved the taking and carrying away and sale by the defendant of two hundred and thirty-six bushels of the wheat for one dollar and sixty-two cents per bushel, and of fifty bushels of it to another purchaser, and that from one hundred and fifty to two hundred bushels of it was remaining in the defendant's granary which the sheriff afterward formally claimed and demanded of him by virtue of his levy on it, and which he refused to deliver to him or to let him have.

H. Penington (John B. Penington with him): There were two counts in the declaration both alleging that the plaintiff, the sheriff, was in possession of the wheat in question on the 9th day of July, 1872, which he claimed to be by virtue of his levy upon it merely, for it was not pretended that he had ever taken or had it in his actual possession or custody under the executions or either of them. But when such is the case, and there is no actual seizure or taking of the goods into his possession under the execution by a sheriff, the levy dates only from the inventory and appraisement of the goods under it, which in this case was on the 28th day of July, 1872. The wheat in question, however, as the proof shows, was taken and carried away from the premises by the defendant prior to that time, to wit, on the 24th and 26th days of that month. *Farmers' Bank v. Massey*, 1 Harr. 186. The inventory and appraisement of the goods is the levy. *Sipple v. Scotten*, 1 Harr. 107; 2 Sel. N. P. 1362. The sheriff must have made an actual levy on the

wheat and have had the actual possession of it before and at the time of its conversion to maintain an action of trover for it. 12 *Johns.* 402. And the relation of the lien back to the time when the execution was delivered, if levied in sixty days afterward, does not remedy his defect in an action of trover for the conversion of them prior to the levy. To recover in this action the plaintiff must have had property in the goods and the right to the immediate possession of them at the time of their conversion, and the levy must have been complete also at that time. 9 *Bac. Abr.* 646. The inventory and appraisement of the goods under the execution constituted the levy in this case, as they were none of them seized or taken into possession by the sheriff until several weeks after the execution had come to his hands, and after the wheat had been carried away by the defendant. *Layton & Sipple v. Steel*, 3 *Harr.* 512. And though the writ binds the goods from the time it is delivered to the sheriff it gives him no property in them until it is levied on them. 12 *Law Libr.* 88; *Herm. on Execu.*, sec. 186; 30 *Ill.* 446; 2 *Hil. on Torts* 200; 2 *T. R.* 755. If goods be moved on premises after execution delivered to the sheriff but before actual levy, and is afterward levied on them, they are subject to rent in preference to the execution. *Shuster v. Robinson*, 3 *Harr.* 50; 19 *Pick.* 364. And as the inventory and appraisement was the only levy in this case and constituted an essential fact to establish the plaintiff's right to maintain this action, it was especially incumbent upon him to prove when it was made, and clearly that it was made before the alleged conversion of the wheat.

The defendant in the executions must have had a sole property, and not an undivided interest, in the goods to give the sheriff a property in them by levying them upon the goods. 1 *Ch. Pl.* 155, *Rev. Code* 735.

Massey, for the plaintiff: The practice of the sheriff in all the counties of this State had long been when levying an execution on goods at once to make out what they term an inventory and appraisement of the goods, consisting of a written statement of the several articles with their own estimate of the value of each

of them respectively in dollars and cents, and entered immediately following it in the statement, and this, as soon as it is completed, they enfold and preserve with the writ itself from that time, and which they uniformly call and consider their levy of the execution on the goods named in it, and their only levy on them, except when they actually seize and take them into their possession and custody under them for safe-keeping when deemed necessary or advisable. Afterward, and before the day of sale and the return of the writ at the return term of the court, they cause a further appraisement of the goods and chattels levied on as set forth in the inventory before made by them to be made by two impartial and sworn men of the county and signed by them and entered in the inventory, which is attached to the writ and made a part of the sheriff's return to it. And this is uniformly done afterward when there is convenient time for it, and which could seldom if ever be done at the same time, particularly when great promptitude and dispatch should be required in levying an execution. And was it not that inventory and appraisement always made by the sheriff himself in the first instance that is referred to by the court in all the cases cited on the other side from *Harrington's Reports*? Can it be necessary that an appraisement of the latter description should be made to constitute and complete a mere levy of the execution by the officer on the goods? And could the court have possibly intended that? It has never been so understood in any county of the State, for if that be the meaning of the decisions, he felt warranted in saying, from what he knew of the practice in all of them, there had not been a complete and valid levy of an execution on goods made by a sheriff in either of them since those decisions were announced. But if that be the proper interpretation of them, an actual seizure of the goods and taking them into his official custody under the execution and making an inventory of them by the sheriff would not constitute a levy.

But in the case cited from 1 *Harr.* 107, the text does not fully support the *syllabus* of it. The language of the court is not so strong, direct and positive. It is this: "In England seizure and possession is the only levy, but here the practice is not to take the goods into actual possession. Is not therefore

an inventory and appraisement the substitute for the levy? It would seem reasonable." But which or what appraisement? The practice of the sheriffs he had already referred to was as common then as now, and was as well known to the court and bar then as now. And the sheriff or his deputy always did make the only inventory of the goods made in any case, with his own appraisement of the goods, as he had before stated, and this was always done when the levy was made by him as a part of it, and when no actual seizure of the goods was made was the only levy made, and stood as the substitute for the levy by seizure and possession, as it might well be called under our practice. And it was doubtless to that long-established practice in the sheriff's office, and that inventory and appraisement so made by him, the court referred in all the decisions which had been cited on the other side. The inventory and appraisement in this case, attached to each of the three writs in the hands of the sheriff, recites that it is "an inventory and appraisement of the goods and chattels of John W. Hubbard, seized and taken in execution by virtue of the annexed writ at the suit of Alexander Peterson's executors, this 9th day of July, A. D. 1872, by Samuel Hargadine, sheriff, to wit:" then follows a specification of the several articles with his valuation or appraisement of them respectively stated in dollars and cents in figures, and among them a lot of wheat in shock crop of 1872, appraised at three hundred dollars, the appraised value of all of them aggregating the sum of over two thousand dollars, and at the foot of it on the left hand side and of the date of August 31st, 1872, these words are added: "Appraisement by J. C. Pennewill, Joseph McDaniel, Jr the signatures being in the proper handwriting of each of them respectively. The original of this inventory and appraisement was attached to the writ and duly returned to court, is *prima facie* true, and has not been denied or contradicted by any evidence whatever. 1 *Houst.* 350; 5 *Harr.* 388; 6 *Del. Laws* 656, 447; *Herm. on Execu.*, sec. 161; 1 *Spencer's Rep.* 57; 23 *Wend.* 490; 2 *Gill* 152; 3 *Harr.* 512; *Rev. Code* 515; 3 *Md.* 147.

But even if this constitutes a good ground of objection to the action for so much of the wheat as was taken and converted by

the defendant prior to the 28th of August, 1872, it could be no defense to the action for the one hundred and fifty or two hundred bushels of it which remained in his granary, and formally demanded of him after that time by the plaintiff and which he expressly refused to deliver to him.

The Court, Wootten, J., charged the jury: This is an action of trover sounding in damages, brought on the 24th of October, 1872, by Samuel Hargadine, who was then sheriff of Kent County, against Pressly Ford, the defendant.

On the 9th day of July, 1872, several executions were issued at the suit of the executors of Alexander Peterson against John W. Hubbard and were placed in the hands of the sheriff, who is the plaintiff in this suit, and who on the same day made what he characterized as an *inventory and appraisement* of the goods and chattels of John W. Hubbard, the defendant in the several writs of *feri facias*. The certificate which precedes the inventory is in the following language: "An inventory and appraisement of the goods and chattels of John W. Hubbard, seized and taken in execution by virtue of the annexed writ, at the suit of the executors of Alexander Peterson, this the 9th day of July, A. D. 1872, by Samuel Hargadine, sheriff." The inventory contains a list of the property which was then seized and taken in execution by the sheriff, among which was a "lot of wheat in the shock," which now constitutes the subject-matter of controversy. The plaintiff is seeking to recover the *value* of one-half of the wheat found on the premises, being the share of the defendant as tenant of the land on which it was grown.

It is claimed for the plaintiff that the certificate and inventory made by him on the 9th day of July, 1872, under and by virtue of the several writs of *fi. fa.*, constituted either such an actual or constructive seizure of the goods and chattels of the defendant in the several writs as to give him, the plaintiff, such a special property in the wheat in controversy as entitled him to maintain his action and to recover the value of the wheat alleged to have been taken and removed from the premises on which it was grown, and where it was when the inventory and alleged levy

were made, being one-half of the crop of 1872; this is claimed by the plaintiff as his right of action as against a tort-feasor, though there was no appraisement made by two appraisers until the 31st of August of the same year.

On the part of the defendant it is insisted that the plaintiff did not and could not acquire such a special property in the wheat in controversy as would enable him to maintain an action of trover for damages, although there may have been a conversion by the defendant, without having made an inventory and appraisement by two sworn appraisers, which appraisement he insists must have been made before the alleged conversion of the property by the defendant, denying that the sheriff's certificate and inventory constitute such a seizure as will entitle him to recover either the appraised value or such value as may have been proved by the witnesses. This is the great and important question in the case now before us, and perhaps I might say the only one in reference to which it is our duty to instruct you; there are, however, some less important ones upon which we have been requested to charge you about which I may have something to say before I am done.

The sheriff received the several executions on the 9th day of July, 1872, and made his inventory and appraisement on the same day, and his return shows that on the 18th day of September following he sold the property "as per inventory and appraisement." But it appears from the evidence that the wheat was not sold for the reason asserted by the plaintiff, that after the seizure and making his inventory and appraisement the defendant tortiously took and possessed himself of it, and afterward converted it to his own use by selling and otherwise disposing of it. This, gentlemen, is a question of fact for your consideration and determination from all the evidence before you. We feel it our duty, however, to say to you that if you are satisfied from the evidence, and you are to consider nothing else, that Ford, the defendant, admitted that he sold the wheat in controversy to Stockly, it is evidence of conversion by him and he is concluded by his admission to the extent of the quantity sold by him to Stockly. And we further say to you that if you are satisfied from the evidence that the sheriff made a demand

upon Ford, the defendant, for the wheat or such part thereof as had not been sold or otherwise disposed of and which still remained in his possession, and that he asserted his right and title to it, and refused to surrender or deliver it to the plaintiff, that such a claim of right and title and refusal to surrender or deliver it to the sheriff is evidence of conversion and renders him liable to the plaintiff in this action.

I have said to you that the great and important question in this case is whether the sheriff by his certificate and inventory acquired such a special property in the goods so inventoried by him to entitle him to recover in this suit. We are of opinion given to you that the sheriff's certificate and inventory purporting to have been made on the 9th day of July, 1872, constituted such a seizure and levy, and gave him such a special property in the wheat in question as to entitle him to recover, provided the tortious taking and conversion are proved to your satisfaction. If, therefore, you are satisfied from the evidence that there was a tortious taking and conversion by Ford, the defendant, after the 9th of July, 1872, and previous to the commencement of this suit on the 24th of October of the same year the plaintiff is entitled to recover, and your verdict should be for the amount of such damages as in your judgment was actually sustained, and the measure of the damages is the value of the wheat as proved by the witnesses, and not the amount of the inventoried or appraised value. This appraised value was three hundred dollars, and the value, as proved by Stockly, the purchaser of a portion if it, was one dollar and sixty-two cents per bushel; he paid that price for two hundred and thirty-six bushels; and fifty bushels were sold to defendant's brother, and Mr. Voshell, a witness, estimated that portion which was remaining in defendant's granary at from one hundred and fifty to two hundred bushels, making in the aggregate four hundred and thirty-six bushels, which at one dollar and sixty-two cents per bushel would amount to seven hundred and six dollars and thirty-two cents, which is the amount claimed by the plaintiff and if he is entitled to your verdict, he is entitled to recover the full amount of injury sustained as against a tort-feasor, which would be the value of the property tortiously taken and

converted. But, gentlemen, if you are not satisfied from the evidence that there was such a tortious taking and conversion by the defendant, or that there was no valid levy on the wheat before the taking and conversion by the defendant, your verdict should be for him, which would be not guilty. If your verdict, however, should be for the plaintiff, it should be guilty, and that you assess his damages at such amount as you may agree upon as the value of the wheat taken and converted by the defendant, that is, the value proved by the witnesses.

If you should be satisfied from the evidence that the sheriff, who is the plaintiff in this suit, made a levy on the goods and chattels in question under the several writs of *feri facias* on the 9th day of July, 1872, including that portion of the wheat which was remaining in the possession of the defendant at the time of the demand made upon him by the sheriff, or at any other time heretofore and after the 9th day of July 1872, such levy would be a sufficient seizure to entitle the plaintiff to recover in this action, and the measure of damages will be the value of that portion of the wheat as was so remaining in the possession of the defendant; and we also say to you, that if you should be satisfied that the sheriff, after he had made his inventory on the 9th day of July, 1872, made a demand on the defendant for that portion of the wheat which was still remaining in his possession, and that he asserted a right and title to it and refused to surrender and deliver it to the plaintiff, such claim of right and title to it and refusal to surrender and deliver it to the plaintiff, amounted to a conversion by him, and entitles the plaintiff to recover its value in this action. As to the evidence, we can only say to you if it is contradictory or conflicting, you must, if you can, harmonize it; but if you cannot so as to believe it all, you must credit that which you think most worthy of it, and reject such as you may believe to be least entitled to credit. You are the judges, and the sole judges, of the evidence, and after carefully considering it in all its aspects and bearings, your duty is to give it such credit and weight as you in your judgment believe it to be entitled to.

And now, gentlemen, I have but little more to say to you, having as briefly, as I could consistently with the importance of

the case, directed your attention to all the questions of law which have arisen and been presented to us, and which must govern you in your deliberations, as the law of the case, so far as it is properly applicable.

If you shall be satisfied from all the evidence you have that there was a proper and legal seizure and levy upon the wheat in question before the alleged taking and conversion by the defendant, the plaintiff is entitled to your verdict, and the measure of damages is the value of the wheat as proved by the witnesses; and if your verdict should be for the plaintiff, it should be guilty, and that you assess his damages at the amount you may agree upon as the value of the wheat with interest. If you should be of opinion, however, that there was no sufficient levy, or that there was no tortious taking and conversion by the defendant, he will be entitled to your verdict, which would be not guilty.

The statutory law of the State does not require an appraisement by two persons selected and sworn by the sheriff, except in cases in which the sheriff's return is that the goods remain unsold, and the reason for requiring it in such cases I apprehend is very obvious. A levy upon goods and chattels retains its lien for three years as against all subsequent levies or liens, and longer as against the defendant, and therefore it is necessary that the appraisement of them in such case should be made by others than the sheriff himself, that is to say by two disinterested and sworn appraisers, and who would also furnish additional and better witnesses to the identity as well as the value of the goods.

Comegys, C. J., after the jury had left the court-room, took occasion to state that he did not concur with the other members of the court in the charge just delivered to the jury in the case.

BENJAMIN J. POOR v. SAMUEL DARRAH.

In an action of replevin for a mule and a cow, in which the mule but not the cow was replevied and delivered to the plaintiff, who suffered a judgment of *non pros.* by failing to file a declaration in it, on which the defendant took an assignment of the replevin bond, and sued him and recovered judgment upon it, the record of neither action is evidence to support a plea of former recovery in a subsequent action of replevin by the plaintiff against the defendant for the cow only.

ACTION of replevin with a plea of former recovery in another action of replevin in this court between the same parties for the same cause of action, by judgment of *non pros.*, and a suit by the defendant in it against the plaintiff on the replevin bond. It appeared that the goods had been replevied and delivered to the plaintiff in a former action. The proof was that the present action was brought to recover a cow bought by the plaintiff, at a constable's sale on an execution issued by a justice of the peace at the suit of William Campbell against the defendant, for thirty-seven dollars and thirty-six cents, and delivered by the constable to the plaintiff.

Day, for the defendant, objected to the admissibility of the execution in evidence, because there was no inventory and appraisement accompanying it signed by the constable, but his name was written in the body of it in his own handwriting. It was also in fact an *alias* execution, but it did not so appear on the face of it or in any other part of it; and, furthermore, because it was issued more than three years after the recovery of the judgment without being kept alive by execution or revived by *scire facias*.

The Court: The action is by a purchaser to recover goods bought by him at a constable's sale, and all these were but collateral matters which could not now be inquired into on the trial of it, for if such inquiries were allowable in such a case it would have the effect to prevent bidding at such sales. The objections were overruled.

Day: In the former action of replevin which was for a mule as well as the cow now in question in this action, the mule, but not the cow, was replevied and delivered to the plaintiff, who suffered a nonsuit in it for failing to file a declaration, on which the defendant took an assignment of the replevin bond and sued the plaintiff upon it, and recovered judgment against him; and after the judgment of *non pros.* had been entered against him in the first action, the plaintiff instituted this his section action of replevin against the defendant, not for the mule but for the cow only, which he proved on the trial of this case had been wrongfully taken from his possession by the defendant after she had been delivered to him by the constable under his sale. The cow was replevied and delivered to him in the second action.

The Court ruled out the record of the former action of replevin and judgment of *non pros.* in it against the plaintiff and also of the action on the replevin bond, as inadmissible and insufficient to prove a former recovery by the defendant of the property which was now the cause of action in this suit. The case afterward went to the jury and the plaintiff had a verdict.

Fulton, for plaintiff.

Day, for defendant.

JOHN P. WILSON v. GEORGE M. FISHER.

If the purchaser of a horse buys it solely by reason of a false representation of its soundness made to him by the vendor, and which he knew to be false when he made it, the vendor cannot maintain an action for the price of it, for the fraudulent representation would vitiate the sale in that case provided the purchaser gives him notice within a reasonable time after discovering the fraud that he will not complete the bargain by paying the price, and returns or offers to return it in rescission of the contract of purchase.

But if the purchaser soon after becomes aware of the fact that the vendor's representation of its soundness is false, yet takes it on his subsequent admission and further representation that it was a little lame, but put on the road it would soon drive off, and which representation the vendor also knew to be false, still he could not maintain the action for the price of it if the purchaser within a reasonable time after discovering that his second representation was also false, notifies him that he will not pay the price, and returns or offers to return the horse to him and rescind the contract of sale.

As the parties resided in the same county and within fifteen miles of each other, that should have been done by the purchaser the day he discovered the fraud, or at least the next day if possible, to have been done within a reasonable time or as soon as the circumstances of the case would admit.

ASSUMPSIT for the price of a horse sold by the plaintiff to the defendant for ninety dollars. The defense relied on was under the plea of fraud and covin. The sale was admitted, and that the defendant promised the plaintiff on the day of the sale that he would give him his judgment note for the amount. The sale was at a public vendue of the plaintiff's property, who had that day broken up housekeeping, and while he was up for sale the defendant inquired of the plaintiff if he was a sound and gentle horse, for if he was not he did not want him at any price, and the plaintiff replied that the horse was perfectly sound and gentle and without a blemish. The defendant then bid for him and after a time he was struck off to him at ninety dollars. The defendant having learnt soon after the sale that he was a little lame, asked the plaintiff about it, when he told him he was a little lame but put him on the road and it would soon drive off. He drove home with him the same day led behind his horse and carriage, and discovered after driving about two miles that he was lame when he trotted; and the next day when hitched to his carriage he would not go, nor would he go when he was then tried under the saddle. The horse was spavined, and the person who sold him to the plaintiff testified that he informed him at the time that he was not a sound horse, and that he was not selling him as a sound horse. Four days afterward the brother of the plaintiff by his request called on the defendant to get his note for the price, when he told him what he had discovered with regard to him, that the horse did not suit him, and that he was not going to pay that price for him,

and which he soon after told his brother. The plaintiff in the meanwhile had been without any known abode, but learning that he was to be at his father's house on the following day the defendant took the horse there to return him to him and to cancel the bargain, but not finding him there he left him with his father for him, and had not had possession of him since.

Walcott, for the plaintiff: It was not every false representation, even when made with a knowledge of its falsity, by the vendor to the vendee of an article of trade that will vitiate a sale or invalidate a contract, but it must be a material misrepresentation by which the purchaser has been actually deceived and defrauded in the transaction, and on which he relied in making the purchase; in this case, however, the plaintiff immediately after the sale informed the defendant that the horse was a little lame, which was utterly inconsistent with what he had before told him, and yet he took the horse away after that, and no one had ever heard him complain that he had been deceived by that misrepresentation. 2 *Pars. on Contr.* 780, 781, 782; 3 *Houst.* 385. But if he seeks to rescind the contract on such a ground he must offer to do so as soon as the fraud is discovered and yet five days were permitted to elapse before he even took a step to do that, *Story on Contr., sec. 497*, or as soon as the circumstances would admit. 5 *M. & W.* 83; 1 *Ad. & El.* 40.

Massey, for the defendant: Where a matter of fact of immediate importance is peculiarly within the knowledge of the party misstating or misrepresenting it, the fraud involved in it will vitiate the contract. 9 *Ben Monroe* 506; 15 *Ben Monroe* 508; 8 *Hare* 282. The defect was not apparent but latent in the horse as he stood when the defendant bid him off at the vendue, but the plaintiff knew of it and falsely and fraudulently deceived the defendant in regard to it, and that vitiated the sale of the horse to him. 2 *Houst.* 524. As the plaintiff was absolutely without any place of abode during the five days which followed the day of sale, and the defendant took the horse to his father's at the end of that brief interval just as soon as he had learnt that he was to be there, and not finding him there left the horse

in the possession of his father for him, and relinquished from that time any right or claim to him, he did all that it was possible for him to do under the circumstances to rescind the contract of sale, and did, in fact, thereby rescind it.

Walcott replied.

The Court, Comegys, C. J., charged the jury, that if they were satisfied from the evidence that the defendant bought the horse solely by reason of a false representation of his soundness made to him by the plaintiff, and which the plaintiff knew to be false when he made it, he was not entitled to recover in the action, for the fraudulent representation would vitiate the sale in that case provided the defendant gave notice to the plaintiff within a reasonable time after discovering the fraud that he would not complete the bargain by paying the price bid for him, and returned the horse or offered to return it to him within a reasonable time afterward in rescission of the contract of purchase. But if the defendant before he took the horse away from the place of sale became aware of the fact that the plaintiff's representation of his soundness was false, and yet took him away and home with him upon his subsequent admission and further representation that he "was a little lame, but put him on the road and it would soon drive off," and the jury were satisfied from the evidence that that representation was also false, and that the plaintiff knew it to be false when he made it, and that the horse was permanently lame and spavined, not being perceptible as it then stood before the persons attending the sale, and concealed his knowledge of that fact from the defendant, still the plaintiff was not entitled to recover in the action if the defendant within a reasonable time after discovering that the other representation was also false notified the plaintiff that he would not complete the bargain and returned the horse to the plaintiff, or offered to return it to him and rescind the sale.

What will constitute a reasonable time within which the offer to rescind a contract shall be made was a question for the court; whether such a reasonable time had elapsed before it was made in any case arising was a question for the jury. And that

would depend to some extent on the circumstances of the case, but the general rule of law on the subject is that it must be done when allowable without undue delay, and with as much promptitude and dispatch as the circumstances of the case will admit; and as in this case the parties resided in the same county and within fifteen miles of each other, the defendant to have done it within a reasonable time should have returned the horse or offered to return it to the plaintiff on the ground of the fraud the same day he discovered it, or the next day at least, if possible, and he should within that time have taken it back to the plaintiff or to his premises and there left it, and that obligation was not discharged by a delivery elsewhere unless the plaintiff was there or resided there at the time. But even the fact that the plaintiff had just broken up housekeeping and had then no known place of residence anywhere could not have warranted the defendant under such circumstances in taking the horse to the premises of the father of the defendant and leaving him there in his absence, because it could not suffice for the purpose for which it was suggested by the counsel for the defendant, for that might have been done but was not done within a reasonable time after he had discovered the fraud, nor, in fact, until the fifth day after it.

The defendant had a verdict.

NATHANIEL P. LUFF v. NATHANIEL B. THOMAS.

The words, "the said constable," contained in the statement of the cause of action, will supply the omission to state that he was a constable in the entry of the names of the parties on the margin of the docket in a suit by a constable against a purchaser for goods sold at an official sale by him.

CERTIORARI. The docket entries were as follows: Nathaniel B. Thomas v. Nathaniel P. Luff. Action on account for goods bought at the sale of the goods and chattels of John R. French, sold by said constable on the 21st day of November, 1872. Demand, fifty dollars and fifty cents. Summons issued

to Jehu M. Sutherin, Constable, December 7th, 1872, returnable on Tuesday, December 17th, 1872 at 2 o'clock P. M. Return served personally, December 11th, 1872, signed J. M. Sutherin, Constable. December 17th, 1872, the parties appeared, and, after hearing their allegations and proofs, judgment is rendered against the defendant and in favor of the plaintiff for fifty dollars and fifty cents, debt with costs.

The exception was that the record did not disclose a cause of action on the part of the plaintiff below, Nathaniel B. Thomas with sufficient certainty, because it nowhere appears by it that he sued as a constable, or that he was a constable, or had ever been a constable. All it stated was that the suit was by Nathaniel B. Thomas, simply, without any addition whatever, official or otherwise, and that the cause of action was for goods bought at the sale of the goods and chattels of John R. French by "said constable," and the only constable named in the record of the case is "Jehu M. Sutherin, Constable," who served the summons in this suit.

By the Court: The omission to state his office or official addition on the margin of the docket on entering the names of the parties, the plaintiff and defendant, in the heading of the suit below, was sufficiently supplied by the words "said constable," contained in the statement of the cause of action which immediately follows the names of the parties as stated in the record and before any other constable is named, or any other person is referred to as a constable having any connection whatever with the case, and it must therefore be understood, of course, to have reference to the person named as the plaintiff below in the action as the "said constable" from whom the defendant bought the goods at the said constable sale, which the record also sufficiently imports.

Judgment below affirmed

WILLIAM GRIER v. VICTOR DEHAN.

To recover in an action of deceit the plaintiff must prove that the defendant made a false and fraudulent representation of facts to him, and that he so made it with the intent to deceive him.

THIS was an action on the case for false and fraudulent misrepresentations made by the defendant to the plaintiff in renting a farm to him in the State of Wisconsin.

The parties were residing in this State at the time, the plaintiff in the employ, at good wages, of the Du Pont Company on the Brandywine, and the defendant in this city. The first witness examined on behalf of the plaintiff stated that he went with the plaintiff to the defendant's house before the renting to hear what he had to say about the farm, and he said that there were from thirty to thirty-five acres of it cleared, and another portion of it that had been cleared some years ago and which it would not cost much to clear up again, and that there was a five or six-room dwelling-house upon it and a live fence around it. He afterward, in the year 1875, by the request of the plaintiff, went with him and his family, which included his wife and three children, to Wisconsin, and found the farm and a patch of cleared ground on it of from twelve to fourteen acres. There was no dwelling-house on it; there had been a log house on it but it had rotted and tumbled down. There was no fence around the cleared patch mentioned. The defendant said on the occasion before referred to that he thought there was a live fence around the farm. He also said on that occasion that he had never been to Wisconsin. It took a week for them to make the journey to Wisconsin when they went out, but the expenses of their journey back were greater than in going out. After further proof of the expenses incurred by the plaintiff and his family to Wisconsin and back, and the wages he was receiving per month on the Brandywine when he left his employment there for the farm rented to him by the defendant in that State, and proving and putting in evidence his lease for it, the counsel for the plaintiff rested his case.

Pepper (*Whitely* with him), for the defendant, made a motion for a nonsuit. This was an action for a deceit, and a deceit was nothing less than a lie in plain terms, and the alleged deceit or misrepresentation must not only be proved to be false, but it must also be proved that the defendant knew it to be false when he made it. 2 *Steph. N. P.* 780 1283; 27 *E. C. L. Rep.* 336; 2 *East.* 92. But if, as alleged by the plaintiff in this case, the representations of the defendant were untrue, there was no proof that he knew them to be untrue when he made them to the plaintiff.

The Court declined to grant a nonsuit, considering that there was some evidence possible on that point which ought to be left to the decision of the jury.

The counsel for the defendant then called a witness who testified that he had been on the farm in question in Wisconsin in 1861, which the plaintiff knew, and he sent the plaintiff to him before he rented it in 1875 for information about it, and he told him that when he was there in 1861 there were two houses on it, one of which was used as a dwelling-house and the other as a stable, and the dwelling was a log house; that he drew a plan of the farm for him and told him that when he was there in 1861 there were about forty acres of cleared land and meadow on it and that there was a fence around it. The log dwelling-house had two rooms in it only, and was not then fit to live in, but he did not tell the plaintiff so when he came to see him about the farm. When he came back in 1861 he told the defendant that there were two houses on the farm, and the kind of houses they were, but he did not tell him the dwelling-house had five or six rooms in it.

Another witness for the defendant, a son of his, testified that the plaintiff came to see his father two or three times a week in 1875 about renting the farm in Wisconsin, and on one of those visits after his father had read to him a letter received from his uncle out there, telling him not to send anybody out there to buy the farm—the plaintiff said to his father he guessed his uncle did not want anybody to go out and take the farm but

wanted to keep it himself, and then added, with an oath, he did not care, he would go, when his father said to him, "Well, you must go, for it seems I cannot stop you."

Bird, for the plaintiff: In a business transaction such as the renting of this farm was by the defendant to the plaintiff it is fraudulent to assert or positively represent as a fact what the party does not at the time know actually to be a fact, if it turns out that it was not a fact at that time, if the other party is deceived, misled, and damaged by the falsity of it, for actual knowledge to the contrary of his representations if they be false, is not necessary to render the party making them liable in law for the deceit and injury. *Kerr on Fraud and Mistake* 325; 13 *Pet.* 26; 29 *Ala.* 346; 21 *N. Y.* 238; 36 *Barb.* 357; 40 *Barb.* 256; 8 *Hare* 221; 2 *Pa.* 240; 10 *E. C. L. Rep.* 283.

Whitely, for the defendant: We rely on the case of *Fooks v. Waples*, 1 *Harr.* 131.

The Court, Comegys, C. J., charged the jury: In actions of deceit, to entitle the plaintiff to recover he must prove that the defendant made a false and fraudulent representation of facts and that he so made it with the intent to deceive the plaintiff. They were then first to inquire whether the plaintiff was induced to enter into the lease and to proceed to take possession of the property rented by reason of the representations made to him by the defendant, and if so, then whether they were false and known by the defendant to be so when they were made, and were made with the intent to deceive him. If they were satisfied from the evidence before them that such was the case, then their verdict should be for the plaintiff. But they would not be justified in rendering any verdict for him unless all those requisites to a recovery had been proved by the evidence in the case.

With respect to the damages in case their verdict should be for the plaintiff, the only ground laid or alleged for damages seemed to be the expenses of the journey of himself and family and of the transportation of his goods and chattels to Wisconsin and back, and also his loss of wages in the meantime on the Brandy-

wine, the plaintiff averring that he gave up his employment there by reason of the same misrepresentations, and as to the amounts of which proof had been submitted to them in the progress of the trial for their consideration; and while we say to you that these would afford legitimate grounds for damages in the suit in case the jury should be of opinion that the plaintiff is entitled to a verdict, we must at the same time say to you that he is only entitled to a verdict for such an amount of damages as he has proved that he actually sustained in the case. Recurring again to the requisites of the action before stated, and particularly with respect to the intent to deceive, we say to you that it was not necessary that it should appear by the testimony of witnesses that the defendant declared his purpose to deceive the plaintiff, or by any other kind of direct and positive evidence. Fraud is a conclusion of law upon facts proved, and while it is perfectly true that it is not to be presumed merely in any case, yet it may be inferred or concluded from facts proved, as well as any other fact involved in the trial of a cause. If, therefore, in this case, the representation of the quality and condition of the premises made by the defendant to the plaintiff induced him to rent them and to go to Wisconsin with his family and goods to take possession of them, and that representation was fraudulent because of the defendant's knowledge to the contrary, and they should be so satisfied from all the evidence in the case, then they would be justified in drawing from it the conclusion that the intent of the defendant in making them was to deceive the plaintiff.

But the jury should also be satisfied from all the evidence in the case, and under all the facts and circumstances proved in it, that the plaintiff was justified in relying on the representation of the defendant as true, and that he believed it to be true and acted upon it as true. And on that point they should take into consideration the testimony of the witnesses, Dugan, and the son of the defendant, from which it appeared that the defendant had informed the plaintiff previous to the renting that he had never been in Wisconsin, and referred him to a neighbor of his on the Brandywine, Dugan, who had seen the farm, for information in regard to it, and who says the plaintiff did come to see him about it, and that he communicated that knowledge to him, except

with respect to the state of the buildings upon it. They were also to give such weight to the testimony of the son of the defendant as they might consider it justly entitled to, and who stated that the letter produced on the trial and translated before you was read as translated here by his father to the plaintiff in his presence before he left for Wisconsin, and from which it would appear that he supplied him with information, material and important to some extent at least. And in addition to that, you have the testimony of the draughtsman of the lease that the defendant urged the plaintiff not to depend on the information which he could give him in regard to the farm, but to go to a man on the Brandywine who had seen it and could tell him all about it. If the damage sustained and complained of by the plaintiff was caused by false and fraudulent representations made to him by the defendant in regard to the state and condition of the premises, then their verdict should be for the plaintiff, with such damages as he had before stated to them; but if not, then their verdict should be for the defendant.

GEORGE W. KARSNER, surviving mortgagor of GEORGE W. KARSNER, and ELIZA S. KARSNER, his wife, v. JOHN BAILEY and GEORGE T. BAILEY.

The statute of February 1st, 1877, requires that the advertisement of a sale of lands and tenements by a sheriff under a *levari facias* on a mortgage should specify the principal improvements thereon, as much so as it requires it in a sale of lands and tenements under a judgment or other execution process.

LEVARI FACIAS on a mortgage at the suit of the defendants in the rule, the mortgagees, against the plaintiff in the rule, the surviving mortgagor, and sale thereon, and return by the sheriff to this term of the court, and rule to show cause why the sale should not be set aside. The petition and affidavit of the plaintiff in the rule alleged two grounds for it—first, the gross inadequacy of the price for which the mortgaged premises sold, twenty-seven thousand dollars, which was less than one-half of the market

value of them; and secondly, that the sheriff's advertisements of the sale made no mention of the principal improvement or of any improvements whatever upon them.

The proof was that they consisted of a farm of over three hundred acres, including marsh, with two dwelling-houses and two complete sets of farm buildings thereon, well built, of the best materials, at a cost of not less than twenty thousand dollars, and an inexhaustible mine or deposit of green sand or marl of superior quality upon it; but the estimate of the value of it at a sheriff's sale, by the several witnesses, varied from fifty thousand to less than forty thousand dollars.

Gray, for the defendants in the rule, contended that under the recent statute passed February 1st, 1877, 15 *Del. Laws* 617, 618 in relation to the sale of lands and tenements under execution process, it was not necessary, nor did it require, that the sheriff's advertisement of a sale of lands and tenements under a writ of *levari facias* on a mortgage should mention the principal improvements upon them.

The Court, however, held otherwise; and although the general rule is that the court will not set aside a sheriff's sale of lands and tenements on execution process for inadequacy of price alone, unless it is gross, or where it sells for less than half of its estimated value, proved at the hearing, yet when the inadequacy of the price for which it sold is considerable other objections in addition to it will induce the court in the exercise of a sound discretion to do it. In this case, however, the court was clearly of the opinion that the statute referred to requires that the advertisements of the sales of lands and tenements by a sheriff under a *levari facias* on a mortgage should specify the principal improvements thereon, as much so as it requires it in a sale of lands and tenements under a judgment or other execution process, and set aside the sale on the second ground alleged against it.

Bird, for the plaintiff in the rule.

Gray, for the defendants in the rule.

SUPERIOR COURT

SPRING SESSION.

1878.

WILLIAM S. HANSELL & SONS *v.* JACOB LEVY.

Agency may be inferred from circumstances and the conduct of the parties between whom the relation of principal and agent is alleged to subsist in the business, and if A becomes the purchaser of the stock in trade of B at sheriff's sale, but without removing the goods, and B remains in possession of them and continues the business as agent, but without disclosing the name of his principal, the jury will be warranted in presuming that A is his principal in it.

ASSUMPSIT for goods sold and delivered by the plaintiffs, who were merchants in Philadelphia, to the defendant, who resided in Dover.

Fulton, for the plaintiffs, offered in evidence a check to their order on the Farmers' Bank, at Georgetown, to pay for goods sold to the defendant, as they alleged, but signed by "N. Newman, Agent," and was not paid when presented at the bank for want of funds to meet it.

Penington, for the defendant, objected to the admissibility of it, as it was not evidence to support the action against Levy, the defendant.

A witness was then called for the plaintiffs, and proved that he was a clerk in the Farmers' Bank at Dover, and that N. Newman kept an account in that bank, as agent, from 1875 to the

close of 1877, and was in the business of buying and selling ready-made clothing. Another witness proved that he was deputy sheriff of Kent County in 1874, and as such assisted in selling out at sheriff's sale, in that year, Newman's stock of goods in Dover, the bulk of which was bought by Levy, the defendant, but which were not removed from the store; nor did Newman leave it, but continued in the possession of it and of the goods, and in the selling of them as before the sale. The late sheriff of the county was also called as a witness and proved that during his term of office he had in hand an execution against Newman, not as agent but individually, and called at the store to see him about it, when he informed him the goods were not his but were Jacob Levy's.

Penington inquired of him if Jacob Levy was present when that statement was made to him by Newman, and on being answered by the witness that he was not, objected to the admissibility of his testimony, as it was not an admission made by the defendant or a statement made by Newman in his presence even, and was, therefore, not evidence, and asked the court to instruct the jury to that effect.

Fulton contended that it was competent evidence in the case, and cited *Story on Agency*, sec. 47; 2 *Greenl. Ev.*, escs. 59, 60, 63; *Geylin v. De Villeroi*, 2 *Houst.* 311.

The Court, Comegys, C. J., charged the jury: That the goods were sold by the plaintiffs to N. Newman, Agent, but without stating the person for whom he was acting as agent in the purchase of them, nor was that disclosed in his general conduct of the business of buying and selling goods as an agent at that time; but still, if he was then carrying on the business of buying and selling ready-made clothing with the knowledge and consent of Levy, the defendant, as his agent, Levy became his principal in the business, and was liable as such for all debts contracted by him in it, and was bound in law to pay for the goods sold by the plaintiffs to him, provided the jury were satisfied from the evidence in the case that he was then acting with

the knowledge and consent of the defendant as his agent in conducting and carrying on the business, although the fact that he was buying them as the agent of the defendant was unknown to the plaintiffs, if such was in fact the case, when they sold the goods to him. The act of the agent is the act of his principal, and the latter is bound by it provided it is done in good faith and in due execution of the authority conferred upon him for the purpose. And wherever the acts of the agent will bind the principal, there his declarations or admissions in respect to the matter will also bind him if made at the time of the transaction; and such declarations or admissions so made by him may be proved by any one who heard them without producing the agent himself to prove them. But the jury must be satisfied from all the evidence in the case that Newman was the agent of the defendant in the business of carrying on the store, and continued in it as such after the sale of the stock of goods in it by the sheriff and the purchase of the greater part of them at the sale by the defendant. And as his agency in the business after that might be inferred from circumstances and the conduct of the parties between whom that relation is alleged to have subsisted in this case, the fact that the defendant became the purchaser of the goods without removing them from the store, and Newman remained in possession of them and continued the business of buying and selling such goods as agent, but without disclosing the name of his principal, the jury would be warranted in presuming that the defendant was his principal in it.

JAMES H. BOYCE *v.* JOHN C. CANNON ET AL.

In an action of replevin by the purchaser of goods at a constable's sale, the record of the judgment on which the execution was issued is admissible in evidence without the production and proof of the warrant on which it was entered by the justice of the peace.

The plaintiff in such a case must show the judgment and execution on which the goods were sold and he bought them, but he is not bound to show the regularity or sufficiency of the levy of the execution on them by the constable, for that cannot be collaterally inquired into or considered in the action.

Where the goods were not replevied under the writ, the value of them when they were taken by the defendants is the measure of the damages the plaintiff is entitled to recover in the action, and it is in the discretion of the jury to allow him interest thereon if they see proper.

Although the defendant in the judgment stands in the relation of step-father to the plaintiff, if the obligation on which it was entered was not for a just and *bona fide* debt due to the latter, but was a cover merely to shield his property against the claims of actual creditors and the plaintiff allows the goods to remain in his use and possession after the sale of them on the execution, it will vitiate and avoid the sale thereon as fraudulent in law, and the plaintiff will take no title to them, but in the absence of direct and positive proof that such was the case, the fact that he bought the goods at the constable's sale for much less than their value and allowed them to remain in the possession of the defendant would not present sufficient circumstantial or presumptive evidence to sustain the defense of fraud set up in the case, for the provision of the statute of frauds which renders void the sale of goods whether by bill of sale or otherwise, without an actual delivery of them to the vendee, does not apply to a public judicial sale of goods under execution process.

ACTION of replevin for certain live stock, household and kitchen furniture, farming utensils, etc. The plaintiff had recovered a judgment before a justice of the peace against Minos Hitchens, his step-father, for ninety-five dollars and eighty-seven cents and costs, on which an execution had been issued and levied on the goods in question, and on which they had been sold and bought by the plaintiff on the 4th day of December, 1875, who took a bill of sale for them from the constable who made the sale, but without taking them out of the possession of the defendant in the execution and which afterward came into the possession of the defendants in the action, and on the 10th day of January, 1876, a formal demand was made on them by the plaintiff for the possession of them and they refused to deliver them.

On the offer of the record of the justice of the peace in evidence to prove the judgment before mentioned, it appeared to have been entered on a warrant authorizing any justice of the peace to enter judgment on the obligation given for the debt without process. The counsel for the defendants objected to the admissibility of the record in evidence without the production of the warrant also in evidence, and cited *Pennington v. Chandler*, 5 Harr. 394.

But the Court overruled the objection, and it was admitted in evidence without the production of the warrant.

The judgment and the execution thereon, with the levy, inventory, sale, and return of the constable, were then offered in evidence, when the counsel for the defendants objected to the admissibility of the inventory on the ground of its insufficiency and uncertainty in the designation and description of the goods or various articles of personal property referred to in it.

But the Court overruled the objections, and the same were also admitted in evidence.

The constable who had sold the goods under the execution was then called by the counsel for the plaintiff and proved the bill of sale which he had executed and delivered to the plaintiff for the goods in question and purchased by him at the constable's sale, for which he was the highest bidder at the aggregate sum of forty-seven dollars and forty-seven cents. On cross-examination he stated that he did not see the horse or anything mentioned in the levy when it was made by him. He also stated that neither the levy nor the bill of sale designated the number of plows and harrows levied on and sold. After further proving the execution and delivery of the bill of sale by the subscribing witness to it and putting it in evidence and proving the formal demand of the plaintiff on the defendants for the goods and their refusal to deliver them, they proceeded and proved by the testimony of several witnesses that the aggregate value of the goods sold at the constable's sale to the plaintiff was not less than three hundred dollars, on which they claimed interest for the detention of them from the time of the taking by the defendants in their argument of the case before the court and jury.

The counsel for the defendants asked the court to charge the jury that no levy on plows and harrows, or any other kinds of goods in the lump, without designating, at least, the number of them, was a good and valid levy in law, or could confer any legal right or title to them on a purchaser of them at a sale under the execution. 2 *Tidd's Pr.* 1044. Also that interest could not be allowed the plaintiff in case he was entitled to recover in the

action on the value of the goods for the detention of them from the time of the taking by the defendant by the jury in enhancement of the damages claimed by him. *Donely v. McGraun & McClay*, 1 *Harr.* 453; *Truitt v. Revill*, 4 *Harr.* 71; *Pennington v. Chandler*, 5 *Harr.* 394; 6 *Law Libr.* 47. It was also a suspicious circumstance in the case that, notwithstanding a formal bill of sale was taken for the goods by the plaintiff from the constable immediately after the sale of them under the execution, they were never in fact delivered to him, but remained as before in the use and possession of the defendant in it until the came into the possession of the defendants in this action; and as the plaintiff stood in the relation of step-son to the defendant in the execution, it naturally suggested the inquiry and a doubt whether the sale under it was a *bona fide* sale in payment of a real debt honestly due from the step-father to the step-son, or the whole thing, the entry of the judgment without process or contest between them, the issuing of the execution, the gross imperfections and irregularities in the levy of it upon the goods, and which was made without the constable's having seen any of them, and the sale of the whole of them to plaintiff himself for the paltry sum of forty-seven dollars and forty-seven cents, was not all contrived between the two by such an apparently legal and judicial sale to cover the property merely for the benefit of the step-father, who was to retain the use and possession and practically the ownership of it as before, so as to shield it from his actual and *bona fide* creditors. If such was the scheme and design and the bad faith with which the sale was made, then it was fraudulent and void in law, notwithstanding it was characterized by all the legal forms and formalities which a public and judicial sale of the kind can have in any case and the plaintiff could not recover. *Pennington v. Chandler*, 5 *Harr.* 395.

The reply of the counsel for the plaintiff on the law and the facts proved in the case are sufficiently disclosed in the charge of the court to the jury, which was substantially in accordance with it.

The Court, Comegys, C. J., charged the jury: It has been ruled in this court in the case cited by the counsel for the defend-

ants, *Pennington v. Chandler*, 5 Harr. 394, that a purchase of goods at constable's sale in an action like this to recover them, or the value of them, must show the judgment and execution under which they were sold and he purchased them, but is not bound to show the regularity of the proceedings of the constable under the execution, for it is a general and well-settled rule of law that the records and proceedings of a court of competent jurisdiction over the subject-matter cannot be inquired into or controverted in a collateral proceeding or in a trial between different parties on the ground of irregularity. Therefore the matter of objection raised in this case by the counsel for the defendants, that the goods were levied on in bulk, or without sufficient particularity in the designation and description of them in the levy by the constable, could not be inquired into or considered in this action; and consequently it is our duty to say to you, so far as that matter of objection is concerned, it could have no effect whatever to impair the legality or validity of the sale of the goods to the plaintiff under the execution. In that case the court held there was another and a proper mode of meeting and remedying a similar objection raised in it, and that it would have been competent for the defendant in the execution to have raised the objection before the justice of the peace who issued it, and by whom the case was tried, at the return of the constable by whom the levy was made, to such an irregularity in the levy of it, and to have had it set aside by him and a proper levy made. Besides, it would be against sound policy to allow such an objection to prevail in a subsequent suit between other parties and before another tribunal in which it comes up in a collateral way only, as the effect of a contrary ruling would be to deter people from attending and bidding at such public and judicial sales necessarily sanctioned and required by law in the due course and administration of public justice by the appropriate tribunal provided for the purpose.

The value of the goods in question which were taken by the defendants, but were not replevied, it seems, and restored to the plaintiff under the writ, must be ascertained and determined by the jury from the evidence before them in regard to the matter, and if their verdict should be for the plaintiff, whatever they

should find to be the value of them at the time of the taking by the defendants would constitute the measure of the damages which the plaintiff would be entitled to recover for it in the action. As to the claim of interest on that valuation from the time of the taking to the rendition of the verdict made on behalf of the plaintiff in enhancement of the damages to be allowed as but a just and reasonable addition to them, the practice of the court now is to leave it to the discretion and decision of the jury whether interest shall or shall not be allowed on the damages actually sustained in any such case. Upon the defense of fraud presented in the case, the court could only say to the jury that was a defense never to be presumed merely and could only be sustained by direct proof or such circumstantial evidence as clearly and conclusively established it to the satisfaction of the jury in any case in which it is alleged and relied on as a legal defense, and which it unquestionably is in any and every case when so proved and established to the satisfaction of the jury. There was no direct or positive proof whatever produced to sustain the defense of the fraud alleged in this case, and in the absence of any such proof that there was no real debt due from Hitchens to the plaintiff, his step-son, when the obligation was given on which the judgment was entered, and that the purpose of selling the goods under the execution was merely to cover them so as to shield them against debts due to actual and *bona fide* creditors, which would have rendered the whole proceeding fraudulent and void, notwithstanding the apparently legal and judicial proceedings by which it was accomplished, the fact that the plaintiff became the purchaser of the goods at the constable's sale and took a bill of sale for them from him, without a delivery of them to him, but allowed them to remain in the possession of the defendant in the execution, Hitchens, his step-father, from the day of the sale, which was December 4th, 1875, until the taking of them by the defendants, which must have been before the 10th of January following, the date of his demand on them for the goods, cannot and does not present such a chain of circumstantial or presumptive evidence as the law requires to sustain such a defense as that of fraud set up in this case. For if the obligation was given in good faith

by Hitchens to the plaintiff for a real debt to that amount due him, then not only the judgment and execution but the sale of the goods under them, without a delivery of them to the plaintiff was valid and binding, and gave him a good right and title to them, as the provision of our statute of frauds against the sale of goods without actual delivery of them to the vendee does not apply to a public judicial sale of goods under execution process. *Perry v. Foster*, 3 Harr. 293; *Pennington v. Chandler*, Harr. 395.

Moore & Cullen, for the plaintiff.

Layton, for the defendants.

COURT OF ERRORS AND APPEALS

JUNE TERM.

1878.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY (a corporation of the State of Pennsylvania), administrator of THEOPHILUS T. DERINGER, deceased, plaintiff below, plaintiff in error, *v.* DAVID G. NIVEN, administrator of BRONOUGH M. DERINGER, deceased, defendant below, defendant in error.

A corporation created and authorized by statute in another State to administer on the estates of deceased persons in that State, having done so, may sue as such administrator in the courts of this State for a debt due the decedent in this State.

THIS case came up on a writ of error to the Superior Court in and for New Castle County, and was heard before Saulsbury, Chancellor, and Wootten and Wales, Judges. For a statement of the case in the court below see *ante*. p. 163.

The ruling of the court below in the case and now assigned for error in this court was that by the laws of this State no corporation aggregate, whether incorporated by the legislature of this State or of any other State, can be appointed an administrator in this State or can sue as an administrator in the courts of this State.

Higgins, for the plaintiff in error: The rule allowing corporations of one State to contract and sue in their corporate name in another may now be considered as the general law of the

land. 2 *Kent's Com.* 285 and note (a); *Ang. & Ames on Corp.*, secs. 372, 373; *Henriques v. Dutch W. I. Co.*, 2 *Ld. Raym.* 1532; *S. C.*, 1 *Str.* 612; *Bank of St. Charles v. Barnales*, 1 *C. & P.* 569; *Silver Lake Bank v. North*, 4 *Johns. Ch.* 370; *Amer. Ins. Co. v. Owen*, 15 *Gray* 491. While the legislature may have power to prohibit foreign corporations from contracting in the State, until it does so contracts so made will be enforced. *Ang. & Ames on Corp.* 374; *Bank of Augusta v. Earl*, 13 *Pet.* 519. It may now be considered a settled principle of law that a corporation in one State or country may not only sue but make valid contracts in another, provided their charter warrants such contracts, and there is no positive disability by statute for a corporation to make such contracts in the State where they are made. As a general rule, personal rights and contracts have no locality, and the laws of comity apply in their fullest extent between the several States of the Union. 2 *Kent's Com.* 285, note (a); *Bank of Augusta v. Earl*, 13 *Pet.* 519. There is no principle of public policy in this State that forbids a corporation acting as an executor or administrator of the estate of a deceased person. It is not to be found in any statute of the State, but the contrary appears in the act of assembly incorporating The Peninsular Trust, Safe Deposit and Insurance Company with power to administer on the estates of deceased persons, passed in 1873, 14 *Del. Laws* 714. It is said by Blackstone and other writers that a corporation cannot be an executor or administrator, but the reason given is not that it is against the common law or against its policy; the weight of authority, however, is in favor of their common-law ability. 1 *Williams on Executors* 198; *Swin.*, Pt. 5, sec. 9; *Godol.*, Pt. 2, ch. 2, p. 76; ch. 6, p. 85; *Roll's Abr. Tit. Exrs.* (T) 7; *Tol. on Exrs.* 30; 2 *Bac. Abr. Tit. Exrs.* A 2, p. 375. Redfield, the latest writer on the subject, says: "It was once doubted but was subsequently ruled that a corporation aggregate may be named executor." Corporations may also become trustees where the trusts are within the general scope of the purposes for which they are instituted, or even where they are merely collateral to its general purposes, but germane to them. *Vidal v. Girard's Executors*, 2 *How.* 187; 2 *Kent's Com.* 279; *Ang. & Ames on*

Corp. 168; *Perry on Trusts* 42, 43; *McDonogh v. Murdock*, 15 *How.* 367.

The corporation named as plaintiff brings this suit by virtue of the power expressly granted in its charter by the State of Pennsylvania under letters of administration granted to it in that State on the estate of Theophilus T. Deringer, deceased, who was residing and domiciled in that State at the time of his death and by authority of the statute of this State, *Rev. Code, chap. 89, sec. 56, p. 552*, which dispenses with the necessity of ancillary administration in such a case in order to empower such an administrator to sue in this State a debtor of his decedent residing here, clothes the foreign administrator on his producing his foreign letter duly authenticated with all the power of a domestic administrator, and among them with the same power which the latter possess of bringing suit in this State. It prescribes no qualification for the foreign executor or administrator but leaves that to the State granting the foreign letters, and every requirement of it can be fulfilled by the corporation plaintiff in this case. It can enter into bond with surety, if required to truly account for all the personal estate of their decedent in this State which shall come to his knowledge, and faithfully administer and distribute the same according to law. *Ang. & Ames on Corp., secs. 110, 111, 256, 257, 258, 259; 9 Wend. 384; 33 Penna. State Rep. 33.* And it contains, we submit, the only authoritative indication or expression of the policy of this State in regard to the power of foreign executors and administrators to sue in the courts of it, in contradistinction to other foreign suits in them, all of whom may at the option of the defendant be required to give security for the costs of the suit.

G. B. Rodney, for the defendant in error: The demurrer in this case runs back to the first legal defect in the pleadings, which was in the narr and in the bringing of the suit. A corporation cannot be an administrator or perform any function of an administrator in this State unless by special authority conferred upon it as such by the legislature of this State. Even in Pennsylvania it has no such power, except by virtue of the special act of the legislature of that State which created it and

expressly conferred such a capacity upon it. But can such an act, with nothing like it existing or thought of in this State as a mode of providing for executors and administrators to settle the estates of deceased persons who die almost daily within our own limits, have any operation or effect beyond the limits of that State, and is, or can there be any custom or practice or dictate of inter-State courtesy or comity that requires us to give it the same operation and effect here as if it had been enacted by the legislature of our own State? As to the right or power at common law of a corporation aggregate being an executor or administrator, it does not exist, because it cannot take the oath for the due execution of the office. 1 *Williams on Executors* 125. And although this objection may be obviated in England by the appointment on behalf of the corporation of a person styled syndic to receive administration, who is sworn like any other administrator, we have no law or practice to allow it to be done by proxy in this country. A corporation can have no legal existence out of the sovereignty by which it is created, as it exists only in contemplation of law and by force of law; and when that law ceases to operate and is no longer obligatory, the corporation can have no existence. *Ang. & Ames on Corp.*, sec. 161. Such is the elementary and fundamental principle on this subject laid down by the authority cited and ruled in 13 *Pet.* 282, 589; 14 *Pet.* 383, and 73 *Ill.* 143. And although by common practice and usage it may be recognized and make contracts and sue on them in other States and sovereignties, it presents a very different question when such an artificial creation of the law which exists solely by force of it claims to be the legal and living representative of a real though dead man in another State where such a thing was never before heard of and is wholly unprovided for by law in it and which could not now be appointed his administrator in it under any law which we have on the subject. The same fundamental principle is also stated by Judge Story in his work on Conflict of Laws. No State or nation can by its law directly affect or bind property out of its own territory or bind persons not resident therein; and no sovereign has a right to give the law beyond his own dominions, and if he attempts it he may be lawfully refused obedience, for wherever

the foundation of laws fail, there their force and jurisdiction fail also. *Story's Conflict of Laws*, sec. 20. And speaking of the comity of States and nations in this respect, he says every nation must be the final judge for itself, not only of the nature and extent of the duty but of the occasions on which its exercise may be justly demanded. And certainly there can be no pretense to say that any foreign nation has a right to require the full recognition and execution of its own laws in other territories when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable or their provisions are deemed impolitic or unjust. *Ibid.*, sec. 33. Could anything be more at variance with the polity and policy of this State on this important subject than this novel and extraordinary method of administering the estates of deceased persons? But this is emphatically an age of corporations, both great and small, of all sorts and descriptions, and after all no one, perhaps, should be surprised at it out of this State. Could any foreign administrator or one appointed or created under a special statute of another State take out ancillary letters of administration in this State under our general statute providing for the appointment of executors and administrators in any case in which he could not take out original letters of administration under it, and which it is clear this corporation aggregate could not have done had it come into this State in the first instance and applied for original letters under it? I have no hesitation in saying that it is quite as clear that it could not.

But the law on this subject of suits by or against executors and administrators in the courts of any other State or country than those from which they derive their power and authority to act as such is so clearly and distinctly laid down by Judge Story in his work before referred to, that I may confidently claim that it is absolutely conclusive upon the question involved in this case and against the right of this Pennsylvania corporation administrator to maintain this action in the courts of this State.

In regard to the title of executors and administrators derived from a grant of administration in the country of the domicile of the deceased, it is to be considered that the title cannot *de jure*

extend as a matter of right beyond the territory of the government which grants it and the movable property therein. As to movable property situated in foreign countries, the title, if acknowledged at all, is acknowledged *ex comitate*, and of course it is subject to be controlled or modified as every nation may think proper with reference to its own institutions and its own policy and the rights of its own subjects. And here the rule to which reference has been so often made applies with great strength, that no nation is under any obligation to enforce foreign laws prejudicial to its own rights or to those of its own subjects. Persons domiciled and dying in one country are often deeply indebted to foreign creditors living in other countries where there are personal assets of the deceased. In such cases it would be a great hardship upon such creditors to allow the original executor or administrator to withdraw those funds from the foreign country without the payment of such debts and thus to leave them to seek their remedy in the domicile of the original executor or administrator, and perhaps there to meet with obstructions and inequalities in the enforcement of their own rights from the peculiarity of the local law.

It has hence become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by an executor or administrator, or against any executor or administrator, in his official capacity in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary, or the letters of administration there granted to him. But if he desires to maintain any suit in any foreign country he must obtain new letters of administration, and give new security according to the general rules of law prescribed in that country, before the suit is brought. So on the other hand, if a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate situated therein it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained, for the executor or administrator appointed in another country is not suable there, and has no positive right to or authority over those assets, neither is he

responsible therefor. The right of a foreign executor or administrator to take out such new administration is usually admitted as a matter of course, unless special reasons intervene to vary or control it; and the new administration is treated as merely ancillary or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them. Still, however, the new administration is made subservient to the rights of creditors, legatees, and distributees who are resident in the country where it is granted, and the residuum is transmissible to the foreign country only when a final account has been settled in the proper tribunal where the new administration is granted upon the equitable principles adopted by its own laws in the application and distribution of the assets found there. *Story's Conflict of Laws*, secs. 512, 513; *Whart. on Conf. of Laws*, sec. 611. Such is the explicit doctrine of the common law on the subject, both in England and America, as announced by the first authority cited, and which is supported by a list of reported decisions referred to both in England and in this country so exceedingly numerous that I have not thought it necessary to name or produce any of them, and many of which ruled in this country, as clearly recognize that the doctrine thus announced applies to the States of this Union as well as to foreign nations or countries.

Spruance, for the plaintiff in error: Neither the statute nor the practice in this State requires an oath to be taken by an administrator; but if a company is incorporated for the express purpose of performing, among others, such a trust, and an oath should be required of it, the president of it, who is the official representative and in general the sole executive organ of the corporation, would be the proper person and competent to take it. Our statute not only recognizes the ability of foreign administrators to sue in the courts of this State, but expressly provides for it, and has thereby abolished, or at least has modified, the principle of the common law in that respect in this State; and if the condition prescribed in it on which it is to be done in certain contingencies provided for in it is not sufficient to meet the precise or particular objection which has

been raised in this case, it is the province of the legislature and not of the courts to so perfect it as to meet and avoid it in cases like this, for if a judgment should be rendered in this suit in favor of the plaintiff, a foreign administrator, as appears on the record, without any application made for bond and security pursuant to the condition prescribed in the statute, it would unquestionably be a good and valid judgment. And unusual and novel as such a thing may seem, the legislature of a State undoubtedly has the power to incorporate a company to administer the estates of deceased persons, as well as to insure their lives or their property while living. *Ang. & Ames, secs. 110, 111, 256, 257, 258, 259.*

Wales, J.: This is an action of *assumpsit* on certain promissory notes and due bills which were made by the intestate of the defendant to the intestate of the plaintiff. The pleas are *non assumpsit*, the *act of limitations*, *plene administravit*, except the sum of two hundred and twenty-two dollars and eighty-four cents, and a special plea to the effect and in substance that the plaintiff is a foreign corporation existing under the laws of another State with power to administer the estates of deceased persons; "that such power is repugnant to the policy and prejudicial to the interests of this State and of its citizens, and that the action against this defendant being in that character cannot be maintained," etc. The replication to this plea sets forth that the plaintiff is a corporation created by and organized under the laws of Pennsylvania, and by said laws "is authorized to accept and execute the office and appointment of executor or administrator or other trustee, and to accept and execute all such trusts of every description not inconsistent with the laws of the State of Pennsylvania, as may be committed to it by any person or persons whatever, or by any corporation or register of wills, or by any court of record, whether of the said State of Pennsylvania or any other State or of the United States; that the plaintiff hath been duly appointed and qualified as administrator as aforeseaid of Theophilus T. Deringer by the Register of Wills of the City and County of Philadelphia in the State of Pennsylvania, and by virtue of said power, office, and appoint-

ment is entitled to maintain this action," etc. To this replication there was a general demurrer, on which the court below gave judgment for the defendant. The plaintiff assigns this judgment as error.

It is an elementary rule that a general demurrer reaches back through the whole record and attached upon the first substantial defect in the pleadings. Under the operation of this rule the question of the right of the plaintiff in its capacity as an administrator to maintain an action in the courts of Delaware is brought before us for consideration. For although the special plea may be defective, as contended by the plaintiff's counsel, yet, if it appears from a full inspection that the declaration is substantially wrong in its inception, in that the plaintiff has no standing in court, judgment cannot be given for the plaintiff because a bad plea is sufficient for a bad declaration (*Gould's Pldg.* 475), and cannot give a right of action where none exists. If, therefore, at any stage in the progress of a cause a material error should be discovered, as a want of jurisdiction of the cause of action or of the person of either of the parties, it would be the duty of the court to take notice of the error and render judgment accordingly. Or, if at any time it appears that to sustain an action would be contrary to good morals or public policy, the court will not hesitate to dismiss it. The record in this cause upon an entire view of it, as well as the argument of counsel, presents the question whether the plaintiff can act as an administrator in Delaware.

It is not denied that the plaintiff in the State of its creation is clothed with the power to accept the office of an executor or administrator, and to perform all the duties incident to either trust; but the objection is made that the laws of Delaware regulating the granting of letters testatmentary or of administration, while not expressly disqualifying or excluding a corporation, nowhere recognize that a corporation can be an administrator, and, as the power to act in that representative character cannot be granted under the general statute to a domestic corporation, therefore a foreign corporation claiming to act under letters issued in another jurisdiction cannot be permitted to execute its power here or to bring an action in our courts. And it is

further objected that in the absence of positive law a corporation is disqualified and incompetent at common law from being an executor or administrator.

To fully understand the extent and force of the first objection it will be necessary to examine the statute. The law provides that the register of the county in which the deceased last resided, or of the county in which he had any real or personal estate, shall grant letters of administration to some one or more of the persons entitled to the residue of the personal estate; if none of those who are capable will accept, then to one or more of the creditors, and lastly, to any suitable person. The first duty of the administrator is to take and subscribe an oath for the faithful performance of his duties, and then to give a bond to the State with surety to be approved by the register, with the usual condition as to the inventory and appraisement of the goods and chattels, collecting debts due and paying claims against the estate, distributing the residue of the personalty according to law, and rendering a just and true account within a certain time. He is also required to make an affidavit verifying the inventory and list of debts in making his return to the register. *Amended Code, ch. 89, sec. 8 et seq.* These provisions apply to the granting of original or domiciliary letters to the principal administrator of the deceased, who at the time of his death resided in the State or was possessed of property real or personal within its jurisdiction. But where the domicile of the deceased was in another State, and letters have been granted to an administrator in that jurisdiction, the law of this State has provided a very simple substitute for ancillary or subsidiary administration, so that the foreign administrator in most cases may proceed without any delay to take possession of the effects of the deceased and to collect the debts due to the estate. The law, in fact, recognizes the foreign administrator upon the mere production of his commission duly authenticated under the seal of the office or court by whom it was issued, and at once invests him with authority to represent the deceased in the same manner as if he had been originally appointed by a register in this State; and it is only upon the happening of certain contin-

gencies that he will be compelled to take any proceedings of a public or judicial nature in order to confirm his authority.

These contingencies are pointed out in the same chapter, sections 46, 7, and 8. "If the deceased be indebted to an inhabitant of this State in a sum not less than twenty dollars, the executor or administrator, before he shall recover judgment in court, shall cause such letters to be recorded in the register's office in one of the counties and shall also, with sufficient surety or sureties to be approved by the register, become bound to the State in a penalty double the best estimate of the personal estate of the deceased in this State, with condition to be void if he shall truly account for all the personal estate of the deceased in this State which shall come to his knowledge, and faithfully administer and distribute the same according to law." The court may stay proceedings in any action by such administrator, and any person in the State having any personal property of the deceased, may refuse to pay or deliver the same until the letters have been recorded and the security given, but a payment or delivery without such recording or security shall be good. A judgment shall not be reversed nor set aside as irregular on the ground that the recording and security have been omitted unless the special objection shall have been made and overruled, but the court may stay the proceedings in the judgment until those requirements have been complied with. It will be observed that the foreign administrator may act by virtue of the original power granted to him and without any additional warrant from a register in Delaware, and that it is only upon the refusal of a debtor or bailee to pay or deliver money or goods or chattels or upon direct application to the court that he is required to record his letters and give security. He is not obliged to take the oath of office, to make the affidavit verifying the inventory and appraisement, or even to return an account of his receipts and disbursements to the officer who approved his security. The statute leaves him to settle his accounts with the office or court which first appointed him, and after the letters have been recorded and the security given, exercises no further control over him.

The question then to be determined in this branch of the case

is, Does the statute prescribe any condition or duty which the plaintiff, being a corporation, cannot perform, and hence is unable to maintain its action?

There would be a difficulty, perhaps an insuperable one, in a corporation not being specially authorized by the laws of this State performing the conditions necessary to qualify it to take out original letters as administrator in its corporate name namely, taking the oath and making the requisite affidavits, but in the present case no oath or affidavit is required, and the inquiry is brought down to the narrow point whether a corporation constituted as the plaintiff is with power to accept the office of administrator can execute a valid bond, such as is prescribed by the statute. The negative of this proposition was insisted upon by the defendant's counsel, but both the principle and the authority of adjudged cases lead to an affirmative conclusion.

The law in relation to the power, duties, and responsibilities of corporations, public and private, has been much and frequently discussed of late years both in the courts and by text writers. Many doctrines which were once held to be sound, proving unsuited to the demands and usages of business, have been overturned, while others once considered as of doubtful or uncertain authority have long since been accepted and settled as the law of the land.

It was laid down by Blackstone and the notion prevailed for some time that a corporation could not make a parol contract, and could speak and act only by its common seal. 1 *Bl. Com.* 474; but this technical rule of the common law soon gave way and vanished, and today a seal is no more necessary to render valid the acts and contracts of a corporation than of an individual, and in all cases where a natural person would be bound without a seal, a corporation would also be bound. 2 *Kent's Com.* 288. It was once questioned whether a corporation could maintain a suit beyond the jurisdiction in which it was incorporated, but Chancellor Kent, in 1820, in answer to such an objection, declared it to be well settled that foreign corporations could sue in their corporate name and could prove as a matter of fact, if it was denied, that they were lawfully incorporated.

4 *Johns. Chan.* 372. So, too, in regard to its liability to action it has been held that it may be made a defendant in actions of *assumpsit*, trover, trespass, and for the publication of a libel, and even be indicted for malfeasance or nonfeasance. As to its power of making contracts and the kind of obligations a corporation may enter into, there would seem to be little room for serious doubt in the light of the later authorities. A corporation, being created for a specific purpose, can make no contract forbidden by its charter, or in general any contract which is not necessary, either directly or incidentally, for the objects of its creation. *A. & A. on Corp.* 256. The exercise of the corporate franchise, which is the legislative grant of special privileges, cannot be extended beyond the letter and spirit of the act of incorporation; but the result of all the authorities is, that a corporation may by virtue of its implied powers, unless expressly or by necessary implication prohibited, make any contract, either as principal or surety, proper as the usual and ordinary means of carrying on its business under the circumstances under which it may be placed. *Ibid.* 258. In fine, a corporation has the power to do all things necessary to carry out the purposes for which it was incorporated which are not in violation of positive law. When acting within the scope of the legislative purposes of its institution, all its contracts, whether sealed or unsealed written or unwritten, are valid, and it has all the powers of ordinary persons within that limit. *Brady v. The Mayor of Brooklyn*, 1 *Barb.* 584. "It is a well-known principle," says Judge Thompson in *Philadelphia and Sunbury R. R. Co. v. Lewes*, 33 *Penn.* 37, "that a corporation, like a natural person, has a right to carry on its legitimate business by all legal and necessary means not prohibited by law." Every corporation has power to make all contracts that are necessary and usual in the course of the business it transacts, as means to enable it to effect such object unless expressly prohibited by law or the provisions of its charter. *Barry v. Mets. Ex. Co.*, 1 *Sandf. Ch.* 80. The authorities are numerous on this point. In all the cases the difficulty, if any, was not in ascertaining the principle, but in applying it to a special state of facts. The question here is, Would the execution of the administration bond be within the

implied powers of the plaintiff's charter? Its power to take the office and perform the functions of an administrator in the State of its corporate residence is clear and undisputed, and *ex comitate* it should be allowed to exercise the same office here, unless to permit it to do so would be in violation of some positive local law. No such law has been referred to and it is believed that none such exists. Neither its charter nor any statute expressly or by implication prohibits it from making the bond, and the rule of law in such a case is, that when both the charter and statute are silent it has power to make all such contracts as are necessary and usual in the course of business as means to enable it to attain the object for which it was created. *A. & A. on Corp.* 271. In *Dartmouth College v. Woodward*, 4 *Wheat.* 636, the court says: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as *incidental to its very existence*."

Secondly, it is objected that by the common law the plaintiff is not capable of being an administrator. Blackstone, among the disabilities of a corporation, includes its inability to be an executor or administrator, "for it cannot take an oath for the due execution of the office." 1 *Bl. Com.* 477. In *Bacon's Ab. Tit. Executors and Administrators* 2, the same doctrine is laid down on the same ground, but under a *semble*, and with these additional reasons: First, because corporations cannot be feoffees in trust for the use of others; and second, because they are a body framed for a special purpose. When the reason of a rule ceases, so does the rule itself. The plaintiff is not required to take an oath. It has been incorporated or "framed for the special purpose" of acting in the character and capacity in which it has come into court; and it is now well and long established that a corporation may be a trustee in the same manner as an individual, not only of real estate, but of personal property, to the same extent as private persons. *Hill on Trustees* 48 (and cases cited in the note). Says Toller: "It now seems settled that corporations can be executors, and that on their being so named they may appoint persons styled syndics,

to receive administration with the will annexed, who are sworn like all other administrators. Such corporations as can take the oath of an executor are clearly competent," as, for instance, a corporation sole. *Toller on Excs.* 30. There is, then, no inherent disability or disqualification belonging to a corporation as such which excludes it from acting as an administrator, and it may accept the office if not prohibited by its charter, or forbidden by statute, whenever from the objects of its incorporation and the nature of its business it may become necessary and proper, and it is able to comply with the conditions prescribed by law as to giving bond, etc. Practically, the position of the plaintiff is meritorious and unobjectionable. With the express power contained in its charter to receive the appointment of administrator, and with its capital stock pledged as the security required for the faithful performance of its duties, it brings an action in its representative capacity for the recovery of a debt due to its intestate, and is met at the outset by technical rules, which, whatever may have been the reason of their origin and adoption, have either become obsolete or have been so modified and relaxed as to be no longer of general application. The execution of the bond would, at the best, amount to little more than a form, and be without substantial benefit or necessity; but still the defendant is entitled to it, if it is insisted upon, and the plaintiff has a full and lawful power to execute it as it would have to make or indorse a promissory note, or accept a bill of exchange, or to execute any other description of bond which may be fairly and legitimately considered as necessary and proper in the usual course of its business. It has not been made to appear in what manner the interests of this State or of its citizens would be impaired, or in what way its policy would be invaded or subverted, by sustaining the plaintiff's action. Admitting that a corporation may be unable to act as an original administrator under the provisions of the general statute, it does not follow that it may not be recognized as a foreign administrator on the production of letters duly authenticated and giving bond. The word "persons" may extend to and include bodies corporate and politic as well as individuals. *Amend. Code, ch. 5.* If the plaintiff can give the bond, it does all that the law requires.

The rights of our citizens will not be endangered, their property rendered less secure, or the dignity of the State be diminished. If the policy of the State is to be inferred from the history of its legislation, the act of the General Assembly of Delaware of April 9th, 1873, incorporating a company for the special purpose, among others, of acting as administrator would be conclusive of that question. 14 *Del. Laws* 714. In the *Bank of Augusta* 4. *Earle*, 13 *Pet.* 585, cited by counsel on both sides, Chief Justice Taney, in the course of a learned and elaborate opinion, says: "When a court is called on to declare contracts * * * to be void on the ground that they conflict with the policy of the State, the line of that policy should be very clear and distinct to justify the court in sustaining the defense. Nothing can be more vague and indefinite than that now insisted on as the policy of Alabama. It rests altogether on speculative reasoning as to her supposed interests, and is not supported by positive legislation." The point made in connection with this that a corporation can have no legal existence outside of the sovereignty by which it is created, is not supported by argument or authority. The general principle is that a corporation created in one State can make no valid contract in another without the latter's sanction, express or implied; but it has been repeatedly decided that not only can a corporation make a contract in other States, but may be sued by service on its agencies in other jurisdictions. It has already been shown that it can sue in another State.

The great rule in the settlement of estates is, that the personal property is distributed by the law of the domicile, and that prevails where it does not conflict with the *lex rei sitæ*. To ascertain the existence of such conflict is not difficult. When a statute or the unwritten or common law of the State forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, Which of the conflicting laws is to have effect? Generally, force and effect will be given by any State to foreign laws in cases where from the transactions of the parties they are applicable unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*. And courts of justice in one State will,

out of comity, enforce the laws of another State when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens. *Bouv. Law Dic., Comity*. Chief Justice Waite, in the *Pensacola Telegraph Co. v. The Western Union Telegraph Co.*, decided at the October term, 1877, of the United States Supreme Court, states the law on this subject briefly and clearly: "Upon principles of comity, the corporations of one State are permitted to do business in another, unless it conflicts with the law or unjustly interferes with the rights of the citizens of the State into which they come. Under such circumstances no citizen of a State can enjoin a foreign corporation from pursuing its business. Until the State acts in its sovereign capacity, individual citizens cannot complain. The State must determine for itself when the public good requires that its implied assent to the admission shall be withdrawn." *Albany Law Journal*, Vol. 17, p. 309; *Story's Conflict of Laws* 36, 37.

The law of ancillary administration is founded on the duty of every government to protect its own citizens in the enjoyment of their own property and the recovery of their debts, at the same time having due respect to the rights of foreign creditors. When the estate of a deceased person is solvent, there is no difficulty in applying its assets, and it is only in cases of insolvency that any question can arise as to the order of payment of debts, and in such cases the law of the *situs* prevails over the law of the *domicile*. But that question has not been made here, there being no intimation that the estate which the plaintiff represents is not fully able to meet all lawful claims against it. The sole inquiry is as to the incidental or implied power of the plaintiff to comply with the requirements of the statute by giving the bond. This power it has, and, as there is no positive law, or definite and known state policy to prohibit or forbid its exercise of the duties of an administrator, there is no reason why it should not be allowed to maintain this action.

Saulsbury, Chancellor, concurred. Wooten, Judge, dissented.

SUPERIOR COURT.

FALL SESSIONS.

1878.

JOSHUA PARKER v. SAMUEL MOLESTON.

In an action of *scire facias* on a mortgage the transcript of the mortgage and the affidavit of the cause of action must be filed together at the same time by the plaintiff, or he will not be entitled to a judgment at the first term for want of an affidavit of defense.

THE plaintiff held a mortgage against the defendant upon which a *scire facias* had been issued on the third day of October, returnable at this term, and on the same day had filed his affidavit of the cause of action, but the abstract of the mortgage was not filed until the seventeenth day of the month. No affidavit of defense having been filed, the counsel for the plaintiff now moved for judgment on that ground, to which the counsel for the defendant objected because the abstract of the mortgage had not been filed on the same day with the affidavit of the cause of action, and appended to it as it should have been in order to establish and identify the reference of the latter to the former, and as had heretofore been uniformly done in such cases.

The Court sustained the objection and refused the motion for judgment, and *Comegys, C. J.*, remarked that it had been the uniform practice throughout the State to file them together at the same time, and the court were not inclined to sanction a departure from it at this late day.

Fisher, for plaintiff.

Massey, for defendant.

JAMES R. C. OLDHAM *v.* JAMES HOSSENGER and ANDREW J. HOSSENGER, executors of JOSEPH HOSSENGER, deceased.

A sheriff's sale set aside for failure to notice or mention in his advertisement of the sale and description of the land a large and good barn as one of the principal improvements on the premises. Also for gross inadequacy of price.

RULE to show cause wherefore the sale of the lands of James R. C. Oldham by the sheriff and returned to this term of the court should not be set aside on the ground that in his official advertisement of the sale of them under the writ and in his description therein contained of the principal improvements thereon, he omitted to mention or notice a large and good barn on the premises, and for gross inadequacy of price also.

On the production of the writ and the proof it appeared that the lands consisted of three separate tracts, and were so advertised, described, and sold by the sheriff as lots number one, two, and three, and that the first contained three acres and had a good large barn on it, which was not noticed or mentioned in the sheriff's advertisement of the sale and description of the principal improvements upon it; that the second contained twenty acres, was worth eighteen dollars per acre, and sold for one hundred and seventy dollars, and that the third contained ten acres, was worth thirty-five dollars per acre, and sold for three hundred and five dollars.

The Court held that the omission of the sheriff to include the barn in his description of the principal improvements of the first lot mentioned was sufficient to invalidate his sale of that, while the gross inadequacy of the price for which the second lot mentioned sold must invalidate his sale of that. The counsel for the plaintiffs in the writ then made known to the court their desire under these circumstances that his sale of the third lot should be also set aside, and the rule was made absolute.

JOHN M. BROOMALL, trustee of ELIZABETH C. HANCE, assignee of LEVI BRINTON, v. ANTHONY REYBOLD and ANN S., his wife.

A sheriff's sale of land for seventeen thousand five hundred dollars set aside on proof that it was worth from twenty-five thousand to thirty thousand dollars, and that a gentleman of means was at the sale prepared to bid twenty-five thousand dollars for it, but owing to his deafness and inability to hear the bidding and the failure of his agent to pursue his instructions on the occasion, it was struck off for the sum stated.

RULE to show case wherefore the sale of the lands of Anthony Reybold, by the sheriff, for seventeen thousand five hundred dollars, and returned to this term in the above-stated case, should not be set aside. The only ground for setting aside the sheriff's sale was the inadequacy of the price for which it was sold.

No less than ten gentlemen and landowners of high respectability, residing in the section of the country in which the farm lies, testified that they considered it worth from twenty-five to thirty thousand dollars, while one of them estimated it as high as forty thousand dollars. It was also proved that a gentleman of ample means was at the sale prepared to bid twenty-five thousand dollars for it, but owing to his deafness and inability to hear the bidding himself, and the failure of his agent to pursue his instructions on the occasion, it was struck off for the sum of seventeen thousand five hundred dollars.

The Court, on these grounds, made the rule absolute and set aside the sale.

MARY A. HALL, and others v. GEORGE DOUGHERTY executor of GEORGE DOUGHERTY, deceased.

On appeal from the decision of the register upon a petition of review affirming the probate of the will and grant of letters testamentary thereon, because he refused on the application of the petitioners for the review, after hearing

the testimony of the witnesses on both sides, to order an issue of *devisavit vel non* in the case to be tried before a jury in the Superior Court, the court will take cognizance of it, though neither the appeal entered nor the record sent up by him showed that such an order had been applied for by the petitioners for the review or had been refused by the register. And the court will order an issue of *devisavit vel non* to be tried before a jury at the bar of the court on the trial of the appeal. And in such trial the written testimony of a witness then out of the State and in parts unknown, taken before the register on the hearing of the petition for review, is admissible in evidence and may be read to the jury.

Intellectual feebleness or mere weakness of the understanding, or a partial failure of mind and memory, or even to a considerable extent, whether it be natural or the result of injury, or arises from disease, such as apoplexy or paralysis or from any other cause, is not of itself a sufficient ground for setting aside a will if there still remain sufficient mind and memory to enable the testator to comprehend what he is doing, to understand that he is disposing of his estate by will, and to recollect what property he is thus disposing of, and to whom he is disposing of it at the time when he executes the will; if so, he is capable of making a will.

And on the question of his mental capacity to make a will at the time he executed it, the testimony of the subscribing witnesses to it, if persons of intelligence and veracity, is entitled to great weight.

THE case involved the question of *devisavit vel non* as to the paper writing purporting to be the last will and testament of George Dougherty, deceased, and came up at the preceding May term of this court on appeal from the Register of Wills in and for New Castle County, and was so entered upon the docket of the court and on the trial list of that term, but without any such issue or any other issue whatever framed and sent up with it by the register. On the case being called, however, and it so appearing, the counsel for the appellants informed the court that the paper writing purporting to be the last will and testament of George Dougherty, deceased, had been propounded by George Dougherty, his son, as the executor named therein, to the register of wills for probate and allowance, and there having been no caveat filed or objection raised against it by any one interested, the same had been probated before and allowed by the register in the manner and form usual in such cases, and letters testamentary had thereupon been granted by him to the said son, George Dougherty, as the executor of it. But in a few weeks after that a petition was presented to the register on behalf of the appellants, who deny that the said paper writing

is the last will and testament of the said George Dougherty, deceased, and claim that he died intestate, and that they are lawful children and heirs-at-law of his, for a review of the said proceeding, which was granted, and a hearing was thereon afterward had before him, and after hearing the parties and their witnesses and considering the evidence in the case, he affirmed the allowance of the will and granting letters testamentary in the case; before, however, he had announced his decision on the hearing of the petition for review, the petitioners by their counsel earnestly besought him to grant and award them an issue of *devisavit vel non* to try and determine the questions of fact presented in the case and the validity of the will depending thereon before a jury at the bar of this court, but which he declined and refused to award, and from his decision on that prayer of the petitioners and his judgment of affirmation they craved and took their appeal to this court.

The record sent up did not show that any prayer or application had been made by the petitioners to the register in the proceeding before him that he would award an issue of *devisavit vel non* at any stage of the case, or that any appeal had been entered or taken by them on his declining or refusing to award it, but as the statement of the facts made by their counsel in regard to the matter was not denied or contradicted by the counsel on the other side, the court, after consideration, concluded, as the constitution itself provides in very broad and comprehensive terms, that, "The registers of the several counties shall respectively hold the register's court in each county. Upon the litigation of a cause, the depositions of the witnesses examined shall be taken at large in writing and make part of the proceedings in the cause. This court may issue process throughout the State to compel the attendance of witnesses. Appeals may be made from a register's court to the Superior Court, whose decisions shall be final. In cases where a register is interested in questions concerning the probate of wills, the granting letters of administration, or executors' or administrators' or guardians' accounts, the cognizance thereof shall belong to the Orphans Court, with an appeal to the Superior Court, whose decision shall be final." *Con.*, art. 6, sec. 22. And as the right of appeal

from their decisions in the litigation of a cause before them is thus given to this court without any specification or qualification, we consider that it extends and applies to such a decision as was made by the register in this case on the application to him to award an issue of *devisavit vel non* made by the petitioners at that stage of the proceeding; and if we had any doubt on this point, the concluding paragraph of the provision just read would be sufficient to satisfy us that the framers of it designed to include such a case in the construction and operation of it, for in the cases of which he has by law the sole original jurisdiction therein specially stated, cases and questions concerning the probate of wills are the first mentioned and are perhaps the first in importance. The statutory provision, *chap. 89, sec. 4, Rev. Code 539*, which provides that the register shall have power to order any issue of fact whereof he may prescribe the form, touching an instrument purporting to be a will, to be tried by a jury in the Superior Court, is a very old one in this State, and although it is not made expressly imperative upon him by the terms of it to order such an issue in any case, it was certainly not intended to be entirely dependent on his own option, or the constitution would not have given an appeal to this court from his decision on the application of either party for such an order in a case which had been heard and controverted before him to the extent this case had been, while the uniform practice in the register's court in each of the counties has been, so far as our knowledge extends, to order such an issue whenever applied for by either party, after a case concerning the probate of a will had been fully heard before him on a caveat filed against it before allowance, or on a petition for a review filed after allowance, and in such cases the safeguard against the abuse of the right of appeal will be found in the fact that but few, if any, would ask it after such a hearing before the register unless where the material facts in dispute were left on the evidence produced before him in such a doubtful and uncertain state as to render an appeal from his decision denying such an issue in such a case both expedient and proper.

But in addition, to this when we consider that it is only by an issue of *devisavit vel non*, well known in our practice, that the

legal validity or invalidity of a will, when depending on questions of doubtful and disputed facts and circumstances, can be ascertained and determined by the verdict of a jury, and is evidently contemplated and recognized in the provision of the statute referred to, as the proper method of determining them, we cannot come to any other conclusion than that it is our duty and within our province to take cognizance of the appeal in this case, notwithstanding the manner in which it has been brought into this court is wholly without precedent in our practice, but the excuse for that is that probably no case of the kind has ever before occurred in this State.

The next question presented was, How was the appeal in the case to be tried in this court? As usual in cases of appeal from his court to this, the register had sent up, with a complete record of the case before him, the testimony of the witnesses taken in writing before him on the probate of the will, and on which it had been allowed, and also the testimony of the witnesses taken in like manner on the hearing upon the petition for review; and as it had always been the practice in this court on appeals from a register's court to hear and determine them on the record and written testimony of the witnesses sent up by him without the intervention of a jury, it was contended on behalf of the appellee that this appeal must also be so heard and tried.

But the court, after consideration of the question, concluded that as it was a novel and unprecedented case, and the appeal itself was a novel and peculiar one, although on a good and sufficient ground, that is to say, to the decision specially of the register refusing to order and award in the case an issue of *devisavit vel non* to be tried before a jury at the bar of this court on the application of the appellants in the register's court, the sole object of the appeal would be defeated, and the remedy and redress sought by it rendered wholly nugatory and void, unless an issue of *devisavit vel non* should be ordered by this court to be framed and tried before a jury at the bar of it on the trial of the appeal in this court. And accordingly such an order was made by the court, and the case was thereupon continued to this term. Heard at that term before Comegys, C. J., and Wootten and Houston, Judges.

And now at this term the case having been called and a jury impaneled and sworn to try the issue framed and ordered by the court, whether the paper writing in question and thereto annexed, purporting to be the last will and testament of George Dougherty, deceased, was or was not the last will and testament of George Dougherty, deceased.

Lore, attorney for the executor and appellee, then proceeded to prove the execution of the paper writing by George Dougherty as his last will and testament by the testamentary witness.

Robert C. Fraim testified that it was written by him and afterward signed in his presence by George Dougherty as his last will and testament, by making his written mark of the cross to his name, which he had written for him, as appeared at the close of it; and that he then, at the request of George Dougherty, signed it as a witness in his presence. It was written by him more than a year before that in his house or office in Wilmington. In February, 1876, George Dougherty, Jr., his son, called upon him and told him his father had sent him to him to get him to write his will. He asked him if he had any written memoranda for it; he said he had not, but his father had told him what he wanted to put into the will; and he drew the will from the verbal memoranda then given him by George Dougherty, Jr. In March, 1877, he again called on him and said that his father had been stricken with paralysis and wished to complete the will. They then drove out to his father's residence in Brandywine Hundred, went in, and as the day was cold he sat by the fire for a half hour, and during the time inquired of Mrs. Dougherty, George Dougherty, Jr., and Mrs. Weir about the physical and mental condition of the testator. He then went upstairs into the room, where he found him lying in bed, and then to his bedside and asked him if he knew him; he said he did, and mentioned his name. He then told him he understood he wanted to make his will; he said he did, and had sent George to get him to come out and do it. He then read the paper writing in question over to him in his hearing slowly and distinctly, and asked him if he heard it and understood it, and if that was his will and the way he wished to dispose of his prop-

erty by his last will and testament; to which he answered, yes, it was. Mr. James McDermott, the other subscribing witness to it, was then sent for, and after his coming into the room, and he, the witness, had written the name of the testator to it, they raised him up in a sitting position in bed, and placing it on the back of large book before him and the pen in his hand, he made his cross-mark on it, as appears in the signature to it, with his assistance in steadying and guiding his hand as he did it. He then asked him if he wished them (himself and Mr. McDermott), to sign it as witnesses; he said he did, and they then signed it as witnesses there in the room and in his presence. He believed then and still believed that he was at that time of sound, disposing mind and memory. That was done on the 22d day of March, 1877. On cross-examination, he said he had not seen George Dougherty for ten years before that time. He wrote his name to the will and the testator made his mark to it because he was then partially paralyzed and could not write.

James McDermott testified that he signed the paper writing in question as a witness by the request of George Dougherty and in his presence, on the day it bore date, March 22d, 1877, and saw him make his mark to his name written at the foot of it by Mr. Fraim, who drew it, and heard him say it was his will. He was not much acquainted with him, but he thought that he was at that time capable of making a will.

Whiteley, attorney for the appellants, then stated the grounds on which they denied the validity of it as the last will and testament of George Dougherty, deceased, and the first was that he was a man of near ninety years of age, had just suffered a severe attack of apoplexy or paralysis, and was too infirm both in mind and body on that day, which was the 23d instead of the 22d day of March, 1877, erroneously inserted in the paper writing by the draftsman of it at the time of the execution of it, and in the dispatch doubtless with which the whole thing was done by him at that late moment, and in the extremely critical and prostrate condition in which the old man then lay; and in the next place, that if he ever gave any verbal instructions to his son George to go to the draftsman of it to get him

to write a will for him from verbal memoranda of what he had told him to tell him he wanted him to put in it, such a will as was then written in such a manner and from such second-hand verbal instructions merely, and such a disposition of his property by last will and testament as appears in it, could only have been procured by the exercise of undue influence by his son George upon the mind of an aged and infirm father, even then too feeble to resist it.

His property consisted mostly of a farm in Brandywine Hundred, near the Pennsylvania line, containing a hundred and fifteen acres, worth a hundred dollars an acre, which he had bought when he was about fifty years old, and on which he resided up to the time of his death. He had seven children, four sons and three daughters, all of whom survived him except one, his son Samuel, who married and died in his lifetime leaving children to survive him and also his father, with all of whom he had uniformly lived on good terms and treating them with like kindness and affection; and yet in this paper writing purporting to be his last will and testament he is made to cut off five of these children with a legacy of fifty dollars each, and the children of his son Samuel with a legacy of the same amount each, while he devises the whole of the farm to his wife for life, and on her death to his son, George Dougherty, in fee simple.

He proceeded to call and examine the witnesses for the appellants.

Dr. William Calver, sworn: Said he was a practicing physician of Booth's Corner, Delaware County, Pa., nearly five miles from where Mr. Dougherty lived; he visited him professionally on Thursday, March 22d; George Dougherty, Jr., came for him; it was between ten and twelve o'clock A. M. when he got there; he found the testator lying in bed in an unconscious condition; the only way you could tell there was any life in him was by his breathing and by a slight pulsation; he was suffering from an apoplectic attack; did not recover while he was there; should think from the symptoms that the attack was caused by an effusion of blood upon the brain; he gave him some aconite and chloride of potassa; he could not be aroused in any degree by efforts to awake him; volitional movement was entirely suspended;

he was lying like a log, motionless; his eyes were closed all the time he was there; did not expect him to recover when he left that afternoon; thought he would be dead in two hours' time; visited him the next day and found him then able to speak; did not think there was any permanent improvement in his condition then, although he could talk; saw him again on Sunday, April 1st; he was then lying unconscious; saw him again on Monday; he was still unconscious; this was his last visit; in his opinion this unconscious condition was the effect of apoplexy; he did not think when he saw him on the 22d of March he was capable of making a will or anything else, not even capable of taking a drink of water.

Cross-examined: At the first visit he was not in the room more than five minutes; did not think he was there on any occasion more than five minutes except perhaps on the last visit; on the first occasion he said to George Dougherty, Jr., "He may revive; if he does and you have anything to attend to you had better attend to it;" on Friday he articulated with a distinctness which showed marvelous recuperative power in one of his age; his comatose condition on the 1st of April was the result of another attack of apoplexy which occurred on the night before.

Re-direct: He only stayed five minutes on each occasion because there was nothing more he could do for the patient; that was ample time for him to examine into his condition and prescribe for him.

Dr. Joseph H. Chandler, sworn: He visited Mr. Dougherty on the last night of his life, April 5th, 1877; he died about four o'clock the next morning; he was dying at the time he saw him; where a man is stricken with apoplexy and remains in a state of profound coma for ten or twelve hours, recovery is very improbable; in a man of Mr. Dougherty's age, about eighty-eight, a comatose condition lasting for five or six hours would he thought in all probability preclude his recovery; from Dr. Calver's testimony he should not think Mr. Dougherty could have recovered by five o'clock on the afternoon of April 22d sufficiently to make a will.

Cross-examined as to the time in which a man in a comatose condition might recover the use of his faculties, the witness re-

lated the case of his father, who was stricken in a similar manner and at seven o'clock in the morning was perfectly unconscious. Under the influence of restoratives he had so far recovered by five o'clock P. M. as to be able to sit up, converse intelligently, and transact business.

Rev. Peter W. Hochkeppel, sworn: In 1877 he was the priest acting in place of Mr. Kelley, on Brandywine; George Dougherty called for Mr. Kelley to go out and see his father; he went in his place; arrived at Mr. Dougherty's house between two and three o'clock in the afternoon; remained there between twelve and fifteen minutes; when he first saw Mr. Dougherty his momentary impression was that he was in a profound sleep; he did not know whether he or George roused him; at any rate, he tried to rouse him, and he was in doubt as to whether he was asleep or unconscious; he thought sometimes he had been asleep from the fact that when he was aroused he turned and spoke some words which gave him satisfaction and some which did not; he still had an idea that he was probably unconscious; he went there to give him the aid of the Church; his eyes were sometimes open and sometimes closed; the only thing George did that he could remember was that he tried to rouse him and tell him he was there; he did not think he asked him more than ten questions; some he answered satisfactorily, others he did not; could not say how many he answered; he gave him the rites of the Church; he was in doubt as to giving him the rites of the Church and gave him what is called "the benefit of the doubt;" that means this—the Church requires that the recipient should be in a proper state spiritually to receive the last sacraments, and in cases where the recipient is so far gone as to be unable to comprehend the questions addressed to him and cannot tell whether he is thus spiritually qualified, gives him the benefit of the doubt and administers the sacraments; at the time he did not think he could live long; he gave no answer more than "yes," or "no," but, before he left he recited a part of the Lord's Prayer after him; the last rites of the Church consist of prayer and the administration of the consecrated wafer; sometimes he thought he was really *in articulo mortis*, that is, in immediate danger of death; George Dougherty took him home, and on the way he advised him that

if his father had any business to transact he had better have it attended to at once.

Cross-examined at considerable length.

Elizabeth Shelley, sworn: Was the widow of Samuel B. Dougherty, son of the deceased: the children of the testator were named William, Mary Ann, Jane, George, John, Catharine, and Samuel, all of whom survive except Samuel; she was married in 1852, and visited the testator more or less frequently from that time up to his death; her last visit was in January, 1877; was there from Wednesday till Monday on that occasion; he was in a very feeble condition so that he did not recognize her until his granddaughter had explained at considerable length who she was; at times his mind seemed all right but at other times he seemed very forgetful. Witness went on to detail the weak condition, mentally and physically, of the testator at that time, and of the manner in which George "bossed" things, showing a want of respect for the old man.

The witness, who at times during the examination seemed considerably agitated at how kindly the old man had treated her, related how, on one occasion, nine years before that, when her brother-in-law John was going away from home and the old man, much worried thereat, said: "He will never return; they have driven him away; they want to force me to make a will, which I never will, for one child is as near and dear to me as another, and Mary Ann is as good a child as ever a father raised." Witness explained that the reference to Mary Ann was because of some dissatisfaction that had arisen out of her second marriage.

Cross-examined by Mr. Lore: Mrs. Shelley said that the only act of authority she could recall that George, Jr., performed during her visit consisted in hauling a load of manure without consulting his father about it.

Annie McCollum, sworn: Witness visited the old man during his last illness; found him in bed very sick and apparently wandering in his mind; he spoke about having received a letter from Ireland which no one else was fit to read and asked her if she had been hunting rabbits lately; witness was not in the habit of hunting rabbits.

Mr. George Townsend was next called to testify that George Dougherty, Jr., had placed the farm in his hands for sale in November last. The farm is situated in Brandywine Hundred, about five miles from Wilmington, on the road leading from Concordtown to Naaman's Creek, contains a hundred and fifteen acres, according to this evidence, and he was authorized by George, Jr., to sell it at a hundred dollars an acre.

Mr. Whiteley closed here and the other side began to take testimony in reply.

Robert C. Fraim, recalled: After recapitulating his former testimony, Mr. Fraim said that when he arrived at Dougherty's house, between five and six o'clock on the afternoon of March 22d, he found there Mr. Dougherty and Mary Ann Green; he cautioned none of them to go out of the room, as he did not want the old man to be informed of his arrival, so that he might be better able to judge personally of his condition; when he went up-stairs he found the old man lying on his bed in the second story; George Dougherty, Jr., went up with him; he addressed him first; he said to him, "How do you do?" and extended his hand, which he grasped in his own; he then asked him if he knew him, he said, "Yes;" he asked him, "Who am I?" he said, "Mr. Fraim, do you think I don't know you?" he asked him if he had sent for him to write his will; he said, "Yes;" he then said to him, "I have had your will prepared for some time," and he answered, "Yes, I know that;" it was his right hand that was paralyzed; his left hand was not paralyzed because he bore his weight on it in raising himself in bed; he commenced to read the will to him and asked him if he read loud enough, and he said, "Yes, read on;" he suggested no alteration in the will; he gave an affirmative answer to the questions he asked him, nothing more; he read each item to him, asking at the end of each if that was his will, and he answered, "Yes;" he then asked him about the will as a whole and he made the same answer; he then told him they would require another witness, and the old man said, "George, you will have to go and get somebody," and George suggested a young man about sixteen or seventeen years old, named Reilley; he objected that he was too young and George then said he would get old

Mr. McDermott, to which he assented; they went down-stairs together and George went away and returned in about twenty minutes with young Mr. McDermott; they then went up-stairs and he asked the old man if he could get up and sign the will, and he said he thought he could and asked George to assist him to sit up; George and he helped him up in bed and he laid this document on a book so as to be convenient to sign, and asked, "Is that your last will and testament?" he replied, "Yes;" he asked, "Is it by your request that Mr. McDermott and myself become witnesses to it?" he said, "Yes;" he then put the pen in his hand and guided his hand while he affixed his mark; from his observation of him at the time and his previous acquaintance with him he believed he was of sound disposing mind and memory; he had no doubt whatever as to his testamentary capacity or he would not have allowed him to sign.

Lore then offered in evidence the deposition or testimony in writing of the witness, James Reilley, taken before the register on the hearing before him on the petition for review in the case, who was in the service of George Dougherty, deceased, when the paper writing in question was executed, but could not now be found in the county or State, and whose place of residence could not be ascertained. The last heard of him was that he had since joined a band of wandering gypsies and left the State for parts unknown. He cited in support of it 1 *Grenl. Ev.*, sec. 163.

Whiteley said the question presented had been decided differently in several of the States. If this had been a case tried at a former term of this court, a judge's notes of his testimony at that term might, under the circumstances, be read to prove what it was, if the witness had died in the meanwhile; but in the case before the court, the witness still being alive, and it being before the jury on an issue from the court, and not from the register, it was not admissible in evidence. 6 *Cow.* 162.

By the Court: The case is now before us on appeal from the register, and as required and provided by the constitutional provision which we have before referred to in the litigation of the

case before him, this testimony of the witness named was reduced to writing, and together with the testimony of all other witnesses, in writing also, saw set up with the appeal, and as it makes part of the proceedings in the case, it is of course now before this court on the appeal, and may be read in evidence to the jury. But it might be admitted to be read in evidence, independent of that provision, on the general principle that it was testimony reduced to writing taken in this same case between the same parties on the former hearing of it before the register. *1 Greenl. Ev., sec. 163, 553.*

It was then read to the jury and was to the effect that the old man knew and understood what he was doing when the paper writing was executed.

Robert Burgie, sworn: He had been acquainted with George Dougherty for about two years before his death, and was at his house a good deal during that time, and his conversation was mostly with him when he was there; the last time he was there was about six months before his death, and he was then capable enough of making a will; he is a nephew of his widow, Mrs. Dougherty.

John Forwood, affirmed: Knew George Dougherty from the time he bought and moved, till he died on his farm, in Brandywine Hundred, or about forty years. After his son John moved on his farm adjoining that, he told me that he had offered to sell it to him for a thousand dollars, but he wanted his son George to have the farm he then lived on; that was about a year before his death.

George Lutz, sworn: Was acquainted with George Dougherty and was frequently there; the last time was a week before Christmas in 1876, and talked with him a good deal while he was there on that occasion; he was sound enough in mind and memory then to make a will.

Thomas Wiggins, sworn: He lived with and worked for George Dougherty as a farm hand four years up to the week before Christmas before he died; during that time the old man worked a good deal about on the farm in different ways until he got tired, and then he would quit.

Several witnesses were then called on the other side who impeached the character of George Reilley for veracity in the usual method.

In the argument of the case *Lore* asked the court to instruct the jury: 1, what constitutes a sound disposing mind and memory in contemplation of law; 2, that every person of lawful age who executes such an instrument is presumed to possess a sound disposing mind and memory until the contrary appears and is satisfactorily shown to the minds of the jury called to decide the question; 3, that that question and inquiry pertains and relates to the precise time of the making and execution of the will; 4, that the testimony of the subscribing witnesses to the will is entitled to peculiar weight upon that question in the consideration and determination of it by the jury, and cited *Chandler and Others v. Ferris*, 1 Harr. 454, in which the court charged the jury that if they were of opinion from the evidence that the testator was capable of exercising thought and judgment and reflection, if he knew what he was about and had memory and judgment, his will could not be invalidated on the ground of insanity, which was one of the grounds on which the validity of it was assailed in that case. Neither could it be set aside on the ground of undue influence unless such influence amounted to a degree of constraint such as the testator was too weak to resist; such as deprived him of his free agency, and prevented him from doing what he pleased with his property. Neither advice nor argument nor persuasion would vitiate a will made freely and from conviction, though such will might not have been made but for such advice and persuasion. *Duffield v. Morris' Exr.*, 2 Harr. 375, in which the court said to the jury that reason being the common gift of God to man raises the general presumption that every man is in a state of sanity until the contrary is proved; every man, therefore, of full age has the right to dispose of his property by will, unless he can be shown to be insane, *non compos mentis*, of unsound mind, or wanting what is called a sound disposing mind and memory. A sound mind is one wholly free from delusion, all the intellectual faculties existing in a certain degree of vigor and harmony; the propensities, affections, and passions being under

subordination to the will and judgment, the latter being the controlling power, with a just perception of the natural connection or repugnancy of ideas. Weak minds again only differ from strong ones in the extent and power of their faculties; but unless they betray symptoms of a total loss of understanding or of idiocy or of delusion they cannot properly be considered unsound. A perfect capacity is usually tested by this, that the individual talks and discourses rationally and sensibly and is fully capable of any rational act requiring thought, judgment, and reflection. This is the standard of a perfect capacity; but the question is not how well a man can talk or reason, or with how much judgment he can act, or with how great propriety and sense he can act; it is only, has he mind and reason? can he talk rationally and sensibly? or, has he thought, judgment, and reflection? Weakness of mind may exist in many different degrees without making a man intestable. Courts will not measure the extent of people's understandings or capacities if a man be legally *compos mentis*. Be he wise or unwise, he is the disposer of his own property, and his will stands as the reason for his actions.

Again, in the case of *Sutton v. Sutton et al.*, 5 Harr. 459, the court said to the jury that the testable capacity of such a person as the testator in that case, of whom insanity was not supposed, would amount to nothing more than a knowledge of what he was about when he made the will, and how he was disposing of his property and the purpose so to do it; and as to undue influence over a man of testable capacity, it must be such as to take away his free will such as he is too weak to resist. Mere solicitation will not be sufficient to vitiate a will made by a person having a knowledge of what he is doing and intending to do it when making it, though his act may be brought about by solicitation or that kind of influence which a disposition to gratify another may produce. But if from age or imbecility a testator could be induced to change his will contrary to his intentions and against his own wishes, that would be undue influence, and its effect upon a doubtful or fluctuating capacity would invalidate the will. On all these points the age and bodily condition of the testator, his condition and circumstances, his known affec-

tions and preferences, and the correspondence or contradiction of the will to these affections, the manner of making or altering the will, the persons around him at the time, their capacity and credibility, are all facts to be considered.

In the case of *Cordrey v. Cordrey*, 1 *Houst.* 269, the court charged in substantially the same terms and that, the formal execution of the will being established, the presumption of law is in favor of the capacity of the testator to make it, and in the case of *Lodge's Will*, 2 *Houst.* 418, the court charged that if the jury were satisfied from the evidence that the testator signed the paper writing knowing it to be his will, and the witnesses to it attested and subscribed the same in his presence, the will was duly executed and must be recognized to be a valid will, unless he was mentally incapable of making a will or unless undue influence was exerted over his mind to such an extent as to procure a disposition of his property to be made contrary to his real wishes. Every person is presumed in law to be of sound mind until the contrary is shown, and the burden of showing an unsound mind in the testator rests on the party contesting the validity of the will, and the testimony must relate to the time of its execution. Mere weaknesses of mind or partial imbecility from disease of the body or from age will not render a person incapable of making a will. A weak or feeble-minded person may make a valid will, provided he has understanding and memory sufficient to enable him to know what he is about and to whom he is disposing of his property. If, therefore, the testator at the time of executing the will, was capable of exercising thought, reflection, and judgment, knew what he was doing and how he was disposing of his property and had sufficient memory and understanding to comprehend the nature and character of the transaction, he was capable of making a will. Undue influence must be such an influence exerted over the testator's mind as to take away or destroy for the time his own free will, and must be such an influence obtained either by flattery, excessive importunity or threats, or in some other mode by which such a dominion is acquired over the will of the testator as to overbear and destroy his free agency and constrain him to do against his free will what he is unable to refuse. But

that influence which is acquired by modest persuasion or by arguments addressed to the understanding or by mere appeals made to the affections of the testator, does not in contemplation of law amount to undue influence, or such influence as will invalidate a will.

And in the case of *Jamison's Will*, 3 *Houst.* 108, the court again charged to the same effect and in terms even still more particularly applicable to this case. In that case it said the question of a testator's capacity to make a will is to be decided by the jury solely by the facts which the testimony in the case discloses. And upon that question the opinions of the subscribing witnesses to the will, if they are persons of intelligence and veracity, are entitled to great weight. Intellectual feebleness alone, or mere weakness of the understanding, or a partial failure of mind or memory, or even a failure of mind or memory to a considerable extent, whether it be natural or the result of an injury or of disease, or arises from an attack of apoplexy or paralysis, or from any other cause, is not of itself a sufficient ground for setting aside a will if there still remains sufficient mind and memory to enable the testator to comprehend and understand what he is doing. If he is able to understand that he is disposing of his estate by his will, and to whom he is disposing of it, however weak his intellect may be he is able and competent to make a will. The question is not so much as to the degree of mind or memory possessed by the testator, as this, Was he capable of recollecting what property he was disposing of and to whom he was disposing of it? In a word, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed the will? If they were, then he was capable of making it, and it was his will.

Whiteley, in reply, simply cited *Swinburn* 72 and 3 *Stark Ev.* 1703. The authorities on the subject state that no person who is *non compos* can make a will, and the term comprehends not only idiots and lunatics, but all other persons who from natural imbecility, disease, old age, or other such causes are incapable of managing their own affairs. The words mean the same with

the English words "of unsound mind." An old man become childish or so forgetful as not to remember his own name cannot make a will; and, accordingly, to make a will valid it is not enough for the testator to have had memory sufficient to answer familiar and usual questions, but he must have had a disposing mind so as to have been able to make a disposition of his estate with understanding and reason. Swinburn observes that "the same memory for making a will is not at all times when the party can speak yea or no, and hath life in him, but he ought to have judgment to discern and be of perfect memory, otherwise the will is void," and therefore the evidence ought to go to this extent.

The Court, Wootten, J., charged the jury at length on all the points of law presented in the case, and on which he was requested to charge them by the counsel for the appellee, in conformity with the rulings in the cases cited by him, and the jury returned a verdict that the paper writing in question was not the last will and testament of George Dougherty, deceased.

ELIZABETH H. MAGEE, Administratrix of SAMUEL MAGEE, deceased, *v.* CLAYTON LODGE, No. 4, KNIGHTS OF PYTHIAS.

An action at law will lie against a lodge of the Knights of Pythias for benefits due to a member of it at his death, who had paid his dues to it up to that time.

THIS was an action of *assumpsit* for certain weekly dues at the rate of six dollars per week for forty-six weeks, which it was alleged the deceased was entitled to at the time of his death from the defendant, of which order and lodge he had during that time been a member, with the usual pleas. Heard before Wootten and Houston, Judges, Comegys, C. J., absent.

The act of incorporation of the defendant was put in evidence on behalf of the plaintiff, with a printed copy of the constitution,

by-laws, and rules of order of the lodge, from which it appeared that any member of it who had attained to the knight's degree in it for a period of not less than nine months, and who was in arrears not more than three months in the payment of his dues to it, in case of sickness or disability should be unable to follow his usual or any other occupation, provided the same was not produced by intemperance or other immoral conduct, on application to the committee of relief should receive weekly the sum of six dollars during the continuance of such sickness or disability, but no member should receive benefits for any time previous to being reported to the relief committee. And in no case should any member receive benefits while there was a charge pending against him, and no member applying for benefits who was three months in arrears should receive the same until six weeks after the arrearages were paid. It was further proved that the deceased was admitted a member of the lodge on the 23d day of June, 1870, and continued a member of it in good standing in all respects and of the knight's degree until his death on the 1st day of May, 1877. The amount claimed by the plaintiff was two hundred and seventy-six dollars, with interest from that date.

For the defendant it was proved that the deceased had been admitted a member of the lodge on a certificate of his membership in a similar lodge in New Jersey prior to that time, and had been sick and disabled in all for thirty weeks, up to April 25th, 1875, during which his weekly benefits had been paid to him, amounting to one hundred and eighty dollars; and he had in the meantime during his membership paid in dues to the lodge forty-four dollars and forty cents. During the three months preceding the 22d day of April, 1875, the lodge had paid out in benefits to six members four hundred and twenty-one dollars and ten cents, and for the want of funds it was obliged to suspend the payment of them for six months, as it had authority to do under its constitution, and which was sanctioned by a unanimous vote of the lodge. It resumed payment six months afterward, and after that the deceased was paid sixty dollars, and still later one hundred and fifty dollars was paid to his widow after his death to pay his burial expenses—amounting in the whole to three

hundred and niety dollars. The deceased was sick three different times and in receipt of his weekly benefits from the lodge.

Bird (*Randall* with him) for the defendant, contended that by the constitution and laws of the Supreme Order of the Knights of Pythias, a meritorious and benevolent brotherhood voluntarily associated together and organized as a charitable corporation for their mutual benefit and relief in case of sickness, the plaintiff had her only and appropriate remedy by an appeal to it in this case, and where full justice would have been afforded her had she resorted to it. It could not be considered to constitute under such articles of association a legal obligation or business contract on which an action at law could be maintained, and no such suit at law had ever before been brought in any State in the Union.

Lore, for the plaintiff: This was a contract cognizable in a court of law clearly. The legal consideration for the promise sued on in this action was the dues agreed to be paid by the decedent as a member of it to the lodge, and which were paid by him. The promises were mutual between the parties to the contract and constituted a good and valuable consideration in law for each other.

The Court, Wootten, J., charged the jury: That the action would lie on the contract between the parties alleged in the case, and if they were satisfied from the evidence that there was any balance due from the lodge to the decedent or his administratrix, the plaintiff in the action, after deducting the payments which had been made by the lodge, the defendant, and which were not denied or disputed, they should find a verdict for the plaintiff for that amount with interest from the death of the decedent.

WILLIAM NAILOR v. WILLIAM DANIEL.

A negotiable promissory note obtained by the payees from the maker of it without consideration, upon the suggestion of the party who afterward dis-

counts it for the payees at a higher rate of discount than six per cent., will constitute an accommodation note discounted by him with knowledge that it was such, and will be void for usury.

THE plaintiff had obtained a rule of court on the defendant to show cause wherefore the judgment No. 773, November term, 1877, of this court, of the said William Daniel against him, the said William Nailor, for nine hundred and thirty-five dollars—real debt four hundred and sixty-seven dollars and fifty cents—with interest from the first day of January, 1877, should not be set aside on the ground of usury, and under which the following issues of fact were framed to be tried before a jury at the bar of the court, which were heard before Wootten and Houston, Judges, Comegys, C. J., absent.

First. Whether the promissory note of William Nailor, to the order of Hamilton & Cummins, for four hundred and sixty-seven dollars and fifty cents, dated Smyrna, Del., February 1st, 1877, a copy of which is set forth in the plaintiff's affidavit, was an accommodation note.

Second. Whether William Daniel discounted said note for Hamilton & Cummins by way of loan at a discount greater than six per cent.

Third. Whether the writing obligatory, to wit: the bond and warrant of attorney upon which a judgment No. 773, November term, 1877, in the Superior Court of New Castle County, for nine hundred and thirty-five dollars, real debt four hundred and sixty-seven dollars and fifty cents, with interest from January 1st, 1877, was given by the said Nailor in lieu of said note. (This issue was admitted by counsel on both sides.)

Fourth. Whether it was agreed between the said William Daniel and Isaac D. Hamilton that the maker of said note should have no notice or information that the said Daniel had discounted said note, or that at the maturity of said note the said Hamilton & Cummins were to pay the full face of said note.

Issac D. Hamilton was called to the stand as a witness for the plaintiff in the rule, and was objected to by the counsel for the defendant as incompetent, because of his legal liability on the promissory note mentioned, but the counsel for the plaintiff produced the certificate of his discharge in bankruptcy, subse-

quent to the date of it, and he was admitted and sworn as a witness. He testified that he was a member of the late firm of Hamilton & Cummins, of Smyrna, now in bankruptcy; about February 1st we had some paper we wanted Dr. Daniel to discount; he was in our store at the time; he did not like the paper offered and suggested that we should get some of William Nailor's paper and he would discount that; a few days after I saw William Nailor and borrowed his note for four hundred and sixty-seven dollars and fifty cents; after we got Mr. Nailor's note I told Dr. Daniel we had it and asked him what he would charge me to discount it, and he told me he would do it for fifteen per cent. in excess of six per cent. interest; I told him that was too high a rate for such paper; we owed Dr. Daniel a balance on two notes at the time; a day or two afterward he wrote me that he wanted the balance on these two notes; I went to him, and after consultation I gave him Nailor's note on his terms—fifteen per cent. off and six per cent. interest after that—and he gave me in payment the two notes he held and the balance in money; I then asked him not to notify Nailor, the maker of the note, when it became due, but to look to our firm for payment, to which he agreed, saying he would look to us to see the note paid at maturity; there was nothing said about selling the note, but it was discounted in the way I have stated.

Cross-examined: I got three hundred and eighty-eight dollars for the note after the seventy-nine dollars and forty-seven cents discount and interest was deducted (the note was drawn for four months); out of this three hundred and eighty-eight dollars was deducted, the balance due on the two notes which he held, and the residue I received from Dr. Daniel in money; I cannot recollect how much money was coming to me; Mr. Nailor gave me the note on the day it was dated, February 1st, 1877; our firm failed about March 15th.

On the testimony of this witness the counsel for the plaintiff rested his case.

The counsel for the defendant then called George Harris as a witness, who was sworn and testified that about the beginning of the year 1877 Hamilton & Cummins held a note of his for about eighty-five dollars, and afterward Dr. Daniel told him he

held a note of his given to Hamilton & Cummins for one hundred and seventy-three dollars. He then spoke to Mr. Hamilton about it, and he told him that if it was so he had forgotten it, but he would see about it. He got the note after that from Mr. Hamilton.

Charles H. Dooling was next sworn and testified that he gave, Hamilton & Cummins a note, and Dr. Daniel. told him he had held a note of his for one hundred and sixty-five dollars. Afterward Mr. Hamilton told him he had it, and took it out of his pocket and showed it to him and asked him if that was his note. After he had taken it into his hands and looked at it, he told him that he never signed that note. Mr. Hamilton then said to him if it was not his note he would like for him to give it back to him, but which he declined to do, and kept it.

Before examining the two preceding witnesses, the counsel for the defendant had formally proved and put in evidence a letter from J. D. Hamilton to Dr. Daniel of the following tenor:

SMYRNA, Feb. 6th, '77.

Doct.: I see a chance to make something, and if you will send me the two notes and one hundred and thirty dollars, why you please keep the note inclosed. Will you please sent it by Walter Johnson, as I want to use it right away, and oblige yours,

J. D. HAMILTON.

R. Harrington, for the plaintiff in the rule, in his remarks to the jury contended that upon the facts proved on every issue presented their verdict should be in favor of his client and that it was clearly the case of an innocent maker of a negotiable promissory note for the accommodation of the payees of it, who had at the time he made it and gave it to Hamilton & Cummins no knowledge or intimation of the unlawful and usurious purpose for which it was to be used by them in procuring the negotiation or discounting of it by Dr. Daniel, the defendant in the rule. It had been proved that Mr. Nailor simply made and loaned the note in question to that firm, without any consideration or any legal liability on his part to them for it and merely as an accommodation note for their convenience and

benefit. They procured the discounting of it by the defendant at the usurious rate proved, and after their failure in business it was presented to him as the maker of it for payment, and he paid it by giving him the bond and warrant of attorney proved in the case for the amount of it, and upon which the judgment in question was afterward entered in this court. These facts had been distinctly proved by the testimony of Hamilton, whose veracity had not been impeached and could not be, and which clearly established the affirmative of each of the first three issues presented, although the third had been admitted by the counsel on the other side before any evidence had been produced. And as to the fourth and last issue, the affirmative of that had also been as clearly proved, that the defendant promised Hamilton when he discounted the note for him, that he would not notify Nailor of it when it became due, but would look to him and his firm for the payment of it. And it was after all this had occurred that the plaintiff in the rule learnt of the corruption and usury which vitiated and avoided the transaction in law on the part of the defendant; and it was then he determined to adopt the course which he is here pursuing in regard to it.

G. B. Rodney, for the defendant in the rule: Although the character of Hamilton for veracity had not been directly impeached as a witness in the case, enough had been disclosed in the evidence for the defendant, he thought, to admonish the jury of the danger of deciding every disputed allegation of fact in the case in favor of the plaintiff on the testimony of one such witness only, with the strong bias which he evidently had in favor of that party in the trial of it. But if the jury would turn to his brief letter of February 6th, 1877, to Dr. Daniel, in evidence before them, in which he says: "Doctor, I see a chance to make something, and if you will send me the two notes and one hundred and thirty dollars, why, you please keep the note inclosed. Will you please sent it by Walter Johnson, as I want to use it right away, and oblige yours, J. D. Hamilton," and interpret those "two notes" to mean and refer to the two equivocal notes mentioned in the testimony of the witnesses for the defendant, George Harris and Charles H. Dooling, and which

for obvious reasons were of importance to him far beyond their face value, the first of which was for one hundred and seventy-three dollars and the second for one hundred and sixty-five dollars, and add to them the one hundred and thirty dollars asked for in money in the letter, they would find the aggregate amount would be four hundred and sixty-eight dollars, and only differing from the sum for which Nailor's note was given to Hamilton & Cummins and which was discounted for them by Dr. Daniel to the small amount of fifty cents, the latter being for four hundred and sixty-seven dollars and fifty cents. It was evident from the testimony of those witnesses that both of the notes had been tampered with and their genuineness was denied by each of the makers of them, and if the note inclosed in and sent with the letter by Hamilton to Dr. Daniel was the note of Nailor to Hamilton & Cummins for four hundred and sixty-seven dollars and fifty cents, and the doctor in compliance with the request contained in the letter retained that note and sent Hamilton those two notes and one hundred and thirty dollars in money, or the full equivalent of four hundred and seventy-eight dollars in exchange for it, where do you find any usury in the transaction or in the alleged discounting of that note by Dr. Daniel?

Harrington, in reply, alleged that there was a credit indorsed on one of the notes at that time and challenged the counsel on the other side to produce the notes to disprove the statement if it was not true.

The Court, Wootten, J., charged the jury: That if they were satisfied from the only evidence which they had before them in regard to the matter, that the promissory note in question and referred to in the written issues joined in the case, was made by William Nailor to the order of Hamilton & Cummins without consideration, and merely to enable them to raise money on it for their sole use and benefit by getting it discounted by another party, and that it was delivered by him to them or either of them and was afterward discounted for them by William Daniel in the manner and on the terms stated in the testimony of the witness,

Isaac D. Hamilton, that is to say, for fifteen per cent. in excess of six per cent. interest on the amount for which the note was given, then it constituted in contemplation of law the negotiation or discounting by him of an accommodation note for their benefit made by Nailor, with knowledge on his part that it was such, if the jury were satisfied that the testimony of Hamilton in regard to the matter was true, at a greater or higher rate of discount than six per centum per annum, and was contrary to the statute prescribing the rate of interest for the loan or use of money, which is six per cent., and was void in law for usury; and consequently, if they were satisfied from all the evidence before them in regard to the matter that such were the facts in the case, their verdict should be for the plaintiff in the rule. Otherwise their verdict should be for the defendant in the rule, because it was incumbent upon the plaintiff in the rule to prove to the satisfaction of the jury the affirmative of the issues joined in this case so far as they were disputed or denied.

Verdict for the plaintiff in the rule on all the issues.

JOHN H. ROBERTS v. ISAAC GRUBB, late Sheriff.

There is no qualification or distinction between a resident and a non-resident landlord in the provision of the statute which requires the tenant where the demise is for one or more years to give the landlord, at least three months before the end of the term, notice in writing of his intention to remove from the demised premises, in order to terminate the demise. The words and the requirements of the statute, both in regard to the landlord and the tenant in that respect are to be construed strictly, and the notice required of either must be actually given to the other within the time prescribed by the statute.

ACTION of replevin for goods and chattels taken by the defendant, as sheriff of the county, on an attachment for rent at the suit of William Ware against John H. Roberts, the plaintiff, payable quarterly, three quarters then being due and amounting

to one hundred and twelve dollars and fifty cents. In his plea the defendant justified the taking of the goods under the attachment. Heard before Wootten and Houston, Judges, Comegys, C. J., absent.

The premises were situated in Delaware City. Ware, the landlord, resided in Philadelphia, and the attachment was for three quarters of the rent for the rental year of 1877, which commenced on the 25th day of March in that year. Roberts, the plaintiff, was tenant of the premises during the preceding year, and as such prepared a written notice dated and signed by him on the 24th day of December, 1876, and inclosed it in an envelope and addressed it to Ware in Philadelphia, and mailed it that day in the post-office at Delaware City, of his intention to leave and vacate the premises on the 25th day of March following, and by due course of mail it should have reached the post-office in Philadelphia the same day late in the afternoon. The next day was Sunday, and Christmas Day, and it was admitted that it was not delivered to Ware until one o'clock P. M. on Monday, the 26th day of December, 1876, at the post-office in Philadelphia. The goods were removed from the premises and the same were vacated by the plaintiff on the 25th of March 1877, pursuant to the notice, and he refused to pay rent for them after that date. The goods were afterward attached at the suit of Ware and were replevied by Roberts, the plaintiff, as before stated.

J. H. Rodney, for the plaintiff: There is no provision in the statute except the general one prescribing three months' notice in writing by either the landlord or the tenant, the one to the other, of their intention, as the case may be, of terminating the renting at the close of the rental year, and that makes no distinction between a resident and a non-resident landlord; but as Mr. Ware, the landlord in this case, resided in Philadelphia, only a few hours' run on the railroad and by the usual and due course of the mail from Delaware City, he contended that the service of the written notice by the tenant in this case should be held to be a sufficient notice and given in time under the circumstances, in analogy to the well-settled principle of law in regard to giving

notice by letter through the mail of the protest of a negotiable promissory note to an indorser of it, as it was analogous in some respects at least to such a commercial requirement of the law.

Cummins, for the defendant: The statute simply says: "If there be a demise for a term of one or more years, and three months or upward before the end of the term either the landlord do not give notice in writing to the tenant in possession to remove or the tenant do not give like notice to the landlord of his intention to remove from the demised premises, the term shall be extended for another year, for which the tenant shall pay the rent and all the stipulations of the demise shall continue in force." *Rev. Code 707, sec. 4*. No distinction is made in it between a resident and a non-resident landlord, nor is there any qualification in the simple and direct terms of it that can admit of the construction that when the landlord resides out of the State the notice in writing may be transmitted to him by mail, provided it can reach him the same day by due course of mail, and if that be done it shall be assumed that the notice in writing was given him in time.

The Court, Wootten, J., charged the jury: That the words and requirements of the statute in relation to such notices were both directory and peremptory in their meaning and character, and had always received, as they should, a strict construction in the application of them, and as they clearly imported that either party to the lease or demise for one or more years, intending to terminate it at the end of the term, shall give at least three months before it actual notice thereof in writing to the other, there could be no room or ground in law for any such construction of the statutory provision in this case as had been contended for by the counsel for the plaintiff under the facts and circumstances proved, and about which there was no controversy or dispute. Their verdict should consequently be for the defendant.

SUPERIOR COURT.

SPRING SESSION.

1879.

ROBERT R. RUSSELL *v* GEORGE R. STOECKEL.

A purchaser of personal property at a sale made by a public officer of whatever kind under process of law, has the right to enter upon the premises of the defendant in the execution in a peaceable and orderly manner without obtaining any permission from him, and to take and carry them away.

If the issue to be tried before the jury be whether the proceedings and acts of the constable in levying upon and selling such property were fraudulent and contrary to the provisions of the act of assembly in such case made and provided, and they should be so found by the jury, and that they were committed with the knowledge and consent of the plaintiff in the process, who purchased them, then he will be liable to the defendant in it in an action of trespass *quare clausem fregit* for entering his premises and taking and carrying away the personal property purchased by him under such process in damages to the value of it.

To constitute fraud on the part of a public officer in the execution of legal process it must be shown that he designedly and willfully acted with respect to the defendant in such a covenous, deceitful, treacherous, and dishonest manner as to deprive him of some right or benefit to which he was entitled or subject him to some damage or injury; and if done with the knowledge and consent of the plaintiff in the process, it would be fraudulent in both of them, and in either case the sale made would be treated in the tribunal out of which the process issued as utterly void, and the plaintiff would not be allowed to derive any benefit from it. So also, if a mere purchaser at such a sale should conspire with the officer to commit the fraud, he could not be allowed to retain any property bought by him at such fraudulent sale.

But although the doings of an officer with or under his process may be irregular, yet, if they are honest, they are so far valid as not to affect the rights of parties taking title under him. Because in that case the validity of the sale cannot be collaterally controverted or inquired into in a proceeding

before another tribunal; and in case of a sale by a constable voidable for a mistake or irregularity committed by either the justice or the constable, it is to be objected to before the justice who issued the process on the return of it.

ACTION of trespass *quare clausem fregit* against the defendant for breaking and entering the close of the plaintiff described in the declaration, and taking and carrying away therefrom and converting to his own use a quantity of corn and fodder belonging to the plaintiff. Among other pleas, the defendant pleaded that he had before that recovered a judgment against the plaintiff before a justice of the peace on which execution had been issued and levied on the said corn and fodder, and by virtue of which the same was afterward advertised and sold, and that at the sale he became the purchaser thereof and took a bill of sale therefor from the constable, and was thereby entitled to enter the said close without force and to take and carry away the same, as he did, to which the plaintiff replied that the proceedings and acts of the constable in levying upon and selling the goods and chattels of the said Robert R. Russell, as in the said plea mentioned, were fraudulent and against the provisions of the act of the General Assembly of this State in such case made and provided; and to which the defendant rejoined by traversing it and joining issue upon it.

From the evidence it appeared the levy and sale included other goods than the corn and fodder, and among them a stallion valued at three hundred dollars by the appraisers under the execution, and that the goods were advertised to be sold by the constable at eleven o'clock A. M. on the 19th of November following, but were not sold until late in the afternoon of that day, when there were but two or three persons present, the plaintiff in the execution and the defendant in the suit being one of them, who became the purchaser of all the goods for the sum of two dollars and ten cents. It also appeared on the production of the record of the suit between the parties before the justice of the peace that the judgment was recovered on the 5th day of May, 1877, but the execution issued upon it erroneously referred to and recited the date of its recovery to have been on the 3d instead of on the 5th day of May, 1877.

And on the ground of this discrepancy and variance in the

record the counsel for the plaintiff contended that it should be rejected and ruled out of evidence as manifestly a false or incorrect record.

The Court, however, overruled the objection and admitted it in evidence. It was decided in the case of *Pennington v. Chandler*, 5 *Harr.* 394, that a purchaser at constable's sale acquires property though the proceedings be irregular if founded on a judgment and execution, and that the validity of the sale cannot be controverted collaterally; but a question of fraud or bad faith is always open, because fraud vitiates every sale, however public it may be. It is a familiar principle of law that the proceedings of one judicial tribunal cannot be collaterally contradicted or inquired into in another proceeding before another tribunal unless it comes up by due course of law for a rehearing or correction of errors in the latter; and it is well that is so, for otherwise writs of error in many cases would be unnecessary, and in appeals from a justice of the peace the appellate court or this court in the trial of the case on the appeal before a jury would be compelled to act as a court of error, and such a trial would necessarily involve not only an examination and consideration of the facts and evidence in it, but also of the errors in the record of it, a commingling and confusion of issues and inquiries which the law is careful to avoid and will not tolerate. It was also contended by the counsel for the plaintiff that if there was a material and substantial error in the record or any irregularity on the part of the magistrate or constable in the legal proceedings now offered in evidence, and they should be admitted, it would become the duty of the court to instruct the jury that the plea of the defendant founded upon it could not avail him, but was no defense in this action. We do not think so. No case has been cited and none can be found, we think, in which any court has reviewed and set aside in effect the proceedings in another court to judgment, execution, and sale thereon of the defendant's goods, in a case in which such court had jurisdiction of the cause of action and of the parties to it, and it so appeared by the record. That is to say, where it was merely used or introduced as matter of evi-

dence in another case in which other questions and issues were involved and were directly before the latter tribunal by virtue of the pleadings in it. This in our opinion settles the question if we had not authority in *Herman on Execution*, sec. 62, and in the cases there cited, to sustain us in so deciding with respect to the misrecital in the writ of execution of the date of the judgment on which it was issued, and on the same day on which the judgment was rendered as is stated in the record, that is to say, on the 5th instead of on the 3d day of May, 1877. It is true the execution is an essential part of the evidence offered by the defendant to sustain his plea of justification in entering the close of the plaintiff and taking and carrying away the corn and fodder mentioned, and on the offer of it in evidence and the objection made to its admissibility, it is necessarily before the court for our examination and consideration, but on inspection we find that the record itself discloses enough on its face to correct the error referred to and to clearly connect the execution with the judgment. It correctly states the amount of the judgment and the time from which interest runs upon it, the justice of the peace before whom it was rendered, and a proper time of return, and the writ of *venditioni exponas* issued by the justice follows regularly upon the *feri facias*, and is a command to sell the goods levied upon by it; besides, the record of the judgment gives the number of the *feri facias* issued upon it, and the number of the writ corresponds with it. The only thing wrong in respect to it is that in the *fi. fa.* the judgment is stated to have been given on the 3d day of May, 1877, whereas it was in fact given, as the record of it shows, on the 5th day of May, 1877. And this is clearly a clerical error merely on the part of the justice, a mere inadvertence, and practically so immaterial in this case that we should consider it almost a reproach to the administration of justice to suffer it to defeat the admission of the record in evidence for the purposes offered by the defendant, and we therefore admit it.

Robinson (*Layton* with him), for the plaintiff: The breaking and entering of the close and the carrying away of the corn and fodder of the plaintiff by the defendant in the action was

a fact admitted by the only plea of the defendant on which he relies for the defense of it, to which the plaintiff had replied that the sale of them by the constable was fraudulent and void, and if so, then it conferred no right upon the defendant as the purchaser of them at such a sale to enter the premises of the plaintiff and to take and carry them away and convert them to his own use. As the defendant was the plaintiff in the judgment and execution under which the sale was made by the constable, and was present at it during the whole time it was pending and in progress on the day it took place, for it was advertised to begin at eleven o'clock in the morning, but did not commence until late in the afternoon, when the whole amount of the goods and chattels levied on and advertised to be sold under the execution, worth several hundred dollars, was struck off to the defendant as the highest if not the only bidder for the small sum of two dollars and ten cents, and when including him there were not more than two or three persons present, and as the sale was at his instance and for his benefit, and was subject to his control and direction, and he had an interest to depress the sale of the goods and to buy them as low as possible, and was present and in communication with the constable during the whole time, it was but fair and reasonable to presume that whatever was done by the constable under the circumstances was done by his express orders and directions, or at least with his sanction and approval, and which made him a party to and responsible for any wrong or fraud contemplated and committed by the constable in the sale of the goods.

Our replication to the defendant's plea of justification is that the constable's sale was fraudulent and void, and which the defendant by his rejoinder has directly traversed and denied, and upon that issue the only question to be considered and determined is whether it was so or not. Fraud, if established by the evidence to the satisfaction of the jury, in such a case as this will vitiate a constable's sale under execution process. *Pennington v. Chandler*, 5 Harr. 394. But a *bona fide* purchase of the goods at such a sale is not affected by the fraud, nor is it affected by any irregularity in the proceedings by the justice or the constable. If, however, the plaintiff in the execution is

a party or is privy to the fraud, and becomes the purchaser of the goods at such sale, he takes no right or title to them, for the sale as to him is void in law. *Herman on Executions*, secs. 419, 422, 423, 424, 487, 513; *Hazzard v. Burton*, 4 Harr. 62; *Booth's Exr. v. Alfrey's Admr.*, 5 Harr. 129; 1 Root 58; 2 Houst. 510; 4 Wend. 100; *Rol. on Judicial Sales*, secs. 570, 571, 572, 573, 574, 575, 864, 865, 866, 1101—1114, 1115; *Rev. Code* 673 674. As to the point already passed upon by the court on the motion to rule out the record of the judgment and execution when offered in evidence by the counsel for the defendant on the ground of the discrepancy between them as to the date of the judgment then noted but not argued, they now asked the court to reconsider it and to charge the jury that, notwithstanding the record of them was in evidence, that the execution or writ of *fi. fa.*, as it therein appeared, was not sufficient to sustain the plea of justification pleaded by the defendant, as no proof of any judgment recovered on May 3d, 1877, had been produced, and without an execution on such a judgment the plea could be of no avail to him. A sale on an execution which varies from the judgment is void. *Herman on Executions*, sec. 424; 1 Yates 300; 4 J. J. Marsh. 597; 2 Mass. 387; 17 Mass. 240; 9 Mass. 138, 242; 1 Mass. 86; 14 Mass. 20; 13 Mass. 483.

Moore (Cullen with him), for the defendant: In the case cited of *Pennington v. Chandler*, 5 Harr. 394, the court held that a sale by a constable under a judgment recovered before a justice of the peace and execution issued thereon cannot be collaterally controverted or inquired into in this or any other court on the ground of any irregularity, error, or impropriety apparent in the proceedings of the case, whether committed by the justice or the constable, but such matters should be objected to before the justice at the return of the execution and sale on an application to set it aside if the reason for it should appear to be sufficient for it in his judgment. *Rol. on Judicial Sales*, secs. 6, 75, 1139; *Herm. on Execu.*, secs. 62, 328; 4 Taunt. 322; 1 Halst. 414.

The facts and circumstances proved in the case and on which the issue of fraud joined in it turned and depended are suffi-

ciently referred to and stated in the charge of the court to the jury to dispense with any further statement of the evidence in relation to them.

The Court, Comegys, C. J., charged the jury:

GENTLEMEN OF THE JURY: This is an action brought by the plaintiff, Russell, to recover from the defendant, Stoeckel, damages for entering upon his premises and carrying therefrom a quantity of corn and fodder and converting them to his use. In form it is an action of trespass *quare clausen fregit*, and, therefore, the alleged illegal entry upon the plaintiff's premises is the gist of the action or *gravamen*, and the taking and carrying away the corn and fodder of the defendant is matter of aggravation of damages.

It appears from the evidence in the case that Robert Russell was the tenant of certain premises, being a farm in Broad Creek Hundred, the property of Robert J. Lambdin, and that after the 19th of November, 1877, and before December, the defendant, George Stoeckel, entered therein with his teams and took and carried therefrom for his own use a quantity of corn and fodder proved by witnesses to be of the value together of thirty-four dollars. Of these facts there can be no doubt. It therefore follows that if the defendant has not shown a right to do so he was guilty of the trespass complained of, and should be held liable for its consequences, or the damage sustained by the plaintiff—which damage the plaintiff claims was one hundred dollars, though in his declaration he has demanded a greater sum. This is certain also. The case of the plaintiff is set forth by him in the usual mode in the declaration and is answered by the defendant by various pleas, seven in all. Six of them are the usual ones in cases of trespass to realty, and as no evidence was offered by the defendant under any of them but under the seventh only, it will not be necessary to refer to them again. This seventh plea is what is called a justification or excuse for the alleged trespass, and sets forth a judgment by the defendant against the plaintiff recovered on a judgment note on the 5th day of May, 1877, for the debt of fifteen dollars, besides interest and costs, before James P. W. Kollock, Esq., a justice of the

peace of this county, the issuance of an execution of *feri facias* thereon on the same day, being No. 293, a levy by constable Lynch in virtue thereof and return, a *venditioni exponas* to dispose of the levy, being No. 328, and return of sale of part of the goods for the sum of two dollars and ten cents, and a setting apart of the residue appraised at the value of two hundred dollars to the defendant's use under the exemption law of this State. It also sets forth that the goods sold were purchased by the defendant and duly assigned to him by the constable by a bill of sale. In support of this plea the defendant produced and proved the said judgment, the writs of *feri facias* and *venditioni exponas* with their respective returns, the allotment of part of the property levied on to the defendant, and a formal bill of sale from the constable to him for the goods he purchased, to wit, the corn and fodder taken away from the possession of the plaintiff. As these facts are all properly pleaded by the defendant under his plea of justification, the production of the proof of them submitted by him would seem, without looking farther, to be a complete defense to the action.

A purchaser of personal property at a sale made by a public officer of whatever kind, under process of law, has the right to enter upon the premises of the defendant in the execution, in a peaceable and orderly manner, without obtaining any permission from him and to take and carry them away. This necessarily results from the nature of the proceedings, which are judicial in their character, and without the existence of which right judicial sales would be a nullity; for no man would buy if he were driven to his action to obtain possession. The law of the land gives to a purchaser at such a sale the same right that he would have if he bought at private sale of the owner. The sale itself would necessarily include the right to take possession. This is not disputed by the plaintiff, but is admitted.

The plaintiff answers the plea of justification under the proceedings before and process issued by the justice by what is called in law language a replication and is in fact a reply, in these words, in brief—"that the proceedings and acts of the said Elihu M. Lynch, the said constable, to whom the said writs of *feri facias*, No. 293, and *venditioni exponas*, No. 328, were de-

livered to be executed in levying upon and selling the goods and chattels of the said Robert R. Russell, etc., as in the said seventh plea mentioned, were fraudulent and against the provisions of the act of the General Assembly of this State in such case made and provided, and this," etc. I have extracted all of the replication necessary for the consideration of the question it presents. To this pleading the defendant answers by a rejoinder as it is called, traversing or denying the fraud alleged, and issue is understood to be tendered and accepted—that is, one party asserts fraud in the proceedings of the constable, and the other denies it, and both have placed their case before the jury for decision. The case then presents a single issue for you to try, the others presented by the pleadings all being immaterial (except of entering the premises, which is admitted,) if this is found for the defendant—and that is, were the proceedings and acts of the constable, Elihu M. Lynch, fraudulent? If they were, then the plaintiff, Russell, is entitled to your verdict for the value, according to all the evidence, of the corn and fodder taken away by Stoeckel after the 19th of November, 1877, the day of sale; that value is to be fixed as of that time, that is, at what it was then worth, and you may add to that amount interest on the value up to the present time. To express the matter more technically but none the less intelligently, if these acts and proceedings of the constable were fraudulent (and if they were, the defendant Stoeckel, must take the consequences of them, for they were done under his process with his knowledge and concurrence), the plaintiff is entitled to have you find a verdict of guilty against the defendant and to an assessment or award of damages as before stated. The case, then, turns out to be a simple one after all the time occupied in the trial of it before the jury, and turns upon the question alone of fraud or no fraud in the constable's doings in the execution of the process in his hand. Whether or not there was such fraud is a mixed question of law and fact; for first you must be told what fraud is with respect to cases like the present—that is, execution process.

To constitute fraud on the part of a public officer in the execution of legal process, it must be shown that he designedly and willfully acted with respect to the defendant in such a cove-

nous, deceitful, treacherous, or dishonest manner as to deprive him of some right or benefit to which he was entitled, or subject him to some damage or injury. It is very hard to define fraud at any time by general language, and it can be best comprehended oftentimes by examples of it. It would be fraudulent in an officer to willfully mislead a defendant as to the time when he would sell his property, and thus lead him to go to such a distance from home as would disable him from being present at the sale. It would also be a fraud in him willfully to select as one of those to allot him his exemption goods a person whom he knew to be hostile to him, and therefore unfit for that service; also to sell his property in bulk instead of by parcels, to his damage. Many more instances might be given, but these are sufficient for our present purpose. If such acts were done with the knowledge and consent of the plaintiff in the process, it would be fraudulent in both of them; and in either case the sale made would be treated in the tribunal out of which the process issued as utterly void and of no effect, and the plaintiff would not be allowed to derive any benefit from it. So, also, if a mere purchaser at such a sale conspired with the officer to commit the fraud, he would not be allowed to retain any property bought by him at such a fraudulent sale. Fraud, wherever it can be established, vitiates all proceedings had or done in pursuance of it, on account of the effect of it upon all transactions, and by reason also of the legal and just theory that men are presumed to be honest and not dishonest; but fraud must always be established by proof, and is not to be presumed. It can be proved, however, as well by circumstances as by positive evidence.

But were the proceedings and acts of the constable in this case with respect to levying the execution and his subsequent conduct under the other process fraudulent? That is a question for the jury. If they were, then, as they were all under the supervision and direction of the plaintiff through his cognizance of them, he is bound by them and cannot escape the consequences. And here let me say upon this very point that although the doings of an officer with or under his process may be irregular, yet, if they are honest, they are so far valid as not

to affect the rights of parties taking title from him. If it were otherwise, men would hesitate to buy at judicial sales. There is a marked distinction between things void and voidable; with respect to the former, no rights can accrue from them—they are mere nullities; but with respect to the latter it is otherwise—they are valid until avoided in a proper manner. A sale under process issued upon a judgment void for any purpose confers no title whatever upon a purchaser; but where it is not void though it may be defective, a purchaser under process issued upon it would take a title that no court would disturb, for it would be good until shown to be otherwise.

It is the province of the jury to decide upon the facts in all cases presented to them, and this one forms no exception. You are to determine, gentlemen, whether in this case the acts of the constable were such as were fraudulent from what we have told you about the law, and if so whether the defendant was a party to them. We think there is no room to doubt that in the proceedings and acts of the constable he and the defendant were one; therefore if he committed fraud the defendant is *particeps criminis* and equally guilty. But it is not essential to a finding of fraud that you should be satisfied from the testimony that the defendant, Stoeckel, was a party to it, for we charge you that if you should believe the constable alone was guilty of the fraud you will be justified in giving your verdict for the plaintiff. The issue presented is whether or not the proceedings and acts of the constable in the execution of his duty under these executions were fraudulent. That is the question and the only one made by the plaintiff's replication to the defendant's plea of justification. The defendant has accepted it as the matter in controversy by his rejoinder and tendered issue upon it, which has been accepted by the plaintiff. He must therefore abide by the consequences of his rejoinder. The question is not therefore an open one, whether fraud in the constable alone would impair the sale in this case, but whether there was fraud in him at all. It is not disputed that if there were the sale would be invalid and the plaintiff entitled to recover for the trespass to his possession, which is the pith of the action, and damages above the nominal ones for that bare act by way of aggravation

or increase on account of taking away the corn and fodder. The defendant might have raised the question whether the sale was invalid on account of fraud on the part of the constable. By taking a different course in his pleading from that pursued by him he might have required the plaintiff to set forth in his replication the acts and proceedings relied upon as the evidence of the alleged fraud, and by a demurrer have raised the question whether they constituted fraud. He did not choose to do so, however, but was willing to rest his defense upon the issue of fraud or no fraud in the constable alone.

Now, was there fraud in the constable or not? This is a question for you alone to try, and with which this court now has no connection, having endeavored to give you to understand what would constitute fraud in him. There are two facts relied upon by the plaintiff in support of his allegation of fraud—first, the proceedings connected with the allotment of the exempted articles, the steam mill and yoke of oxen, and second the sale of the residue of the property of the defendant for the merely nominal sum of two dollars and ten cents.

We shall not enter into any particular examination of the testimony offered by the defendant to negative the inference sought to be drawn by the plaintiff from these acts. With respect to the first, we have to say generally that while the evidence is not by any means entirely clear and conclusive in relation to the plaintiff's assertion of title to the steam mill, yet evidence has been adduced by the defendant which would seem to show that he treated it as his, while, on the other hand, the purchaser of the land with it upon it, at the sheriff's sale made prior to these proceedings, says that he himself claimed to be the owner of it, and refused to allow the plaintiff, Russell, to remove it from the premises sold except upon conditions which the plaintiff did not comply with. Taking the testimony in relation to this subject on both sides, if you should feel justified in concluding that the plaintiff did not assert his title to the mill and consent to its assignment to him, but that it was put upon or allotted to him by the freeholders, there would not be evidence of fraud on the part of the constable to support the issue, unless it has been shown that the freeholder selected by him acted under a corrupt

influence proceeding directly from the constable himself. We have not heard any such evidence.

Concerning the sale itself, we feel it just to say to you that there does not appear to our minds by any conclusive proof that actual fraud was practiced here; but it appears by the testimony offered by the defendant that the plaintiff was present when it took place. He has not furnished us with any evidence that he made any protest or objection to it.

It is unnecessary to consider various questions of law submitted by the counsel on both sides during the progress of the examination of the testimony, because the only issue is fraud or no fraud in the constable—a pure question of fact for the jury, and the jury alone, to decide; and we have already passed upon the only one presented which in our opinion was material in the case.

In conclusion, we say to you, gentlemen of the jury, that if you should consider, after all we have said to you about this case and what would constitute fraud under the issue, that the evidence would warrant you in deciding, upon the oaths you have taken, that any one of the acts or proceedings of the constable in this case was a fraudulent act, intended and contrived by him to take advantage of the ignorance, want of knowledge, or circum-spection of the plaintiff, then you would be justified in giving him a verdict; but this must be upon the evidence before you, and not upon surmise, conjecture, or imagination; for we repeat to you emphatically that fraud must always be proved and is not to be presumed merely. In case you should find for him, then he is entitled to so much money in amount as shall represent the value of the corn and fodder, as proved to you, at the time it was carried away, and also to interest thereon from that time to the present by way of damages resulting from the breach of the plaintiff's premises and the exportation of his goods. As no damage was done to the premises of an appreciable nature, he would be entitled to nothing more under the pleadings; but if upon consideration of the testimony you do not believe the constable meant to wrong the plaintiff, although you do not approve the proceedings and acts had and done by him, your verdict should be for the defendant.

JOHN DOE, on the demise of HENRY C. BARRETT and SABIA C. BARRETT, his wife, in right of said SABIA C. and GEORGE F. EASTON and ANNIE E. EASTON, his wife, in right of said ANNIE E., v. RICHARD ROE, casual ejector, and ELIZABETH A. JEFFERSON, tenant in possession.

Whenever in an action of ejectment a claim of right by adverse possession of twenty years or more is set up by the defendant against the clear and undisputed legal title of the plaintiff to the premises, the burden of establishing it to the satisfaction of the jury always rests upon the defendant.

In a case of disputed title on such a ground, if the evidence simply be that a mother who held the legal title to the premises in question allowed a son of hers to take possession under a verbal agreement merely to buy them of her and to use, occupy, and enjoy them as his own property for several years and as long as she lived afterward, although she devised them in her will, made in the meantime, to two of her granddaughters, the jury will be warranted in presuming that he had bought them of her, and if so, his possession of the premises had been adverse from the time he had entered into possession of them under the agreement.

But if their verbal agreement further stipulated that he was to pay her rent for the premises until he had paid her the price agreed on for them, the relation of landlord and tenant subsisted between them with respect to the premises, and his possession of them was permissive and not adverse, so long as that relation continued between them and until he unequivocally repudiated it; and if that was not done by him twenty years at least before the commencement of the action, the plaintiffs, the devisees under her will, were entitled to recover the premises.

The relation of landlord and tenant may be proved by parol or circumstantial as well as written or direct evidence, and the actual payment of rent by one person and the receipt of it by another has always been considered the strongest kind of evidence to establish that relation between them.

THIS was an action of ejectment for a tract of eighty or ninety acres of land in Nanticoke Hundred, commenced on the 30th day of March, 1878. The lessees of the plaintiff claimed title to it under the last will and testament of Elizabeth Jefferson, deceased, probated on the 15th day of September, 1863, in which she devised it to Sabia C. Jefferson (now Sabia C. Barrett), daughter of her son, Cyrus S. Jefferson, and Annie E. Jefferson (now Annie E. Easton), daughter of her son, John W. Jefferson, to them, their heirs and assigns.

John H. Swain, the first witness called for the plaintiff, testi-

fied that he knew the testatrix, Elizabeth Jefferson, and her son, Cyrus S. Jefferson, in their lifetime, and that she owned the tract of land in question; that he lived on it as her tenant in the year 1841 or 1842. Her son, Cyrus S. Jefferson, lived on it, and went on it in 1849. She died in 1863, and in 1866 he had some conversation with Cyrus S. Jefferson about the lands, in which he said that it would have been better if the old woman had not left the land to the girls, and they would have been better off if she had not left it to them, because it would cost more to divide it between them in court than it was worth, and that if the girls would sell it to him at a reasonable price he would buy it of them. Cyrus S. Jefferson remained on the land and used it as his own until his death in 1877.

Ann G. Hubbard was the next witness called, and testified that Elizabeth Jefferson, the testatrix, was her mother, and bought the tract of land in question in 1835, but never lived on it herself. She rented of her the house and garden on it in 1844, and lived there two years. Her brother, Cyrus S. Jefferson, moved on it in 1849 with her mother's permission, and she knows that he paid her rent for it in 1851 and 1852. In 1856 her mother asked him for the rent, to which he replied that he paid the taxes and kept up the repairs, and that was as much as he could do, and that was about the same answer he gave her every year afterward. In 1870 she heard him say that he owned but six feet of land one way and four the other in the world. That was when he was on a visit to us in Philadelphia. And she heard him on the same visit say that he had tried to buy of Mrs. Barrett her interest in it and had offered her a hundred dollars for it, but she hooted at it and demanded five hundred dollars.

The plaintiff produced no further testimony except the paper title of the testatrix to the premises. The defense was that the son of the testatrix, Cyrus S. Jefferson, had entered into possession of the land and premises in question under a verbal agreement with his mother, Elizabeth Jefferson, to buy them of her, and had ever since used, occupied, and enjoyed them as his own up to the time of his death in 1877.

Mary S. Teague, the first witness called for the defendant,

testified that she was the daughter of Elizabeth Jefferson, deceased, and that a short time before the first of the year 1849 her mother asked her what she thought of her selling the Fletcher land (the name by which the tract in question was generally called and known) to her brother, Cyrus S. Jefferson and she replied to her that she thought that they had better remain further apart. She then told her that she had sold it to him, and soon after that he moved on the land and lived on it till his death, and used it as his own and cut the timber on it at his will and pleasure, and if he ever paid her mother any rent for it she never knew it.

Noble Connaway, the next witness, testified that he lived about a mile from the land in dispute and had known it from his early boyhood. Cyrus S. Jefferson went into possession of it in 1848 or 1849, and occupied it as his own up to the time of his death, and cut off all the timber on it. He heard a dispute between him and his mother on the land in 1857 or 1859. She told him to give her an ear of corn as rent for it. He told her he would not do it, but if at any time she wanted an ear of corn from the land she might take it and put it in her pocket, but not as rent, for if she claimed it as rent he would take it out of her pocket.

Joshua A. Lamden, another witness, also testified to the possession of the land by Cyrus S. Jefferson up to the time of his death and that he used and enjoyed it as his own, and cut and disposed of the timber on it when and as he pleased.

William Fleetwood, another witness, testified that he heard Elizabeth Jefferson say in 1851 that her son, Cyrus S. Jefferson, had paid her two hundred dollars for the land, and that it had come at a very good time for her.

Other witnesses were also called and examined by the counsel for the defendant, but their testimony was cumulative merely and added nothing material to the preceding evidence on her behalf.

A mortgage of the premises by Cyrus S. Jefferson to Robert G. Ellegood, executed in 1867, with the writ of *sci. fi.* afterward sued out of court thereon, and the sale thereof by the sheriff to him, and the deed of the sheriff to him for the same, were produced and put in evidence by the counsel for the plaintiff.

Richards, for the plaintiffs: The only defense set up in the case was an alleged adverse possession in law of the premises by Cyrus S. Jefferson for twenty years and more, when the suit was commenced, against the right and title of his mother, Elizabeth Jefferson, and which it is alleged by the defendant in the case was granted to the said Cyrus S. Jefferson by her, and commenced under a verbal agreement between them on her part to sell the land to him, and on his part to buy it of her, the terms of which in no particular whatever have been proved, stated, or even alluded to by any witness examined, or by the counsel for the defendant in his opening or during the examination of the witnesses in the case—not even the price, nor when nor how it was to be paid. It might be, perhaps, that the terms of the contract were to be agreed on afterward, and he was to pay for it as soon as he was able to do so, when the price was to be fixed. Be that as it may, however, it is admitted by the defendant that he entered into the possession of it by and with the express consent of his mother under an agreement with her to buy it, and it was therefore according to the defendant's own claim and pretension a permissive possession in its inception, and so continued to be and could not have become an adverse possession against her until he had clearly and unequivocally repudiated the agreement between them by expressly and positively refusing afterward to pay her for it, which he never did; and there was no proof by any witness in the case, and no pretension or allegation even made on the other side, that he ever repudiated or attempted to repudiate it by refusing to pay her the price agreed upon for it, whatever that might have been. Even if he failed in fact to pay her anything for it, as we say and believe he did, it could not in law have constituted a repudiation of the agreement by him; while, on the contrary, if he paid anything it was a distinct recognition on his part that it was then a subsisting agreement between them. *Ang. on Lim. secs. 384, 385; 1 Johns. 155; 9 Johns. 174; 2 Bibb. 506.*

Admitting that Cyrus S. Jefferson was in what is termed the permissive possession of the premises under an agreement with his mother to buy them of her and pay her for them at a future time, then it was perfectly evident that she was grossly mis-

taken as to her legal rights and the true nature and quality of her claim in law against him when she demanded of him that he should pay her rent for the premises instead of the purchase-money for them according to the contract price agreed upon between them. For if such was simply the agreement, of course he owed her no rent, though he may not have paid her a cent of the purchase-money in the meantime, and therefore she had no right in law by the terms of the agreement to make such a demand upon him, while he had a right equally as clear and complete in *forum legis* to refuse to comply with it. But even such a marked, emphatic, and absolute refusal to pay any rent or anything as rent for the premises as had been proved in this case on his part, could not possibly be interpreted to constitute either in law or fact a repudiation by him of his promise or agreement to pay her the purchase-money or the price agreed on for them, or any part of it. So much then for his repudiation of any obligation to pay rent for the premises, and we will let it pass.

But suppose the alleged agreement between them in regard to his buying the land was not quite so thin as had been represented; and as it seemed that he was to have his own time to pay for it, that it was further agreed between them, as was very probable, that he was to pay taxes, keep up repairs, and give her some specified portion of the crops yearly as rent in lieu of the annual interest on the contract price for the premises until he had paid it in full to her, then and in that case the agreement and the possession of the premises given him under it clearly constituted for the time being a renting or demise of them by her to him on those terms, coupled with an executory contract or agreement on her part to sell and convey them to him by a good and valid deed of bargain and sale on his paying her for them the price agreed on between them; and if so, then she had a perfect right to demand such rent from him in the meantime, and the fact that she did demand rent from him afterward only rendered the supposition more reasonable and probable. And if there was such a renting or demise of the premises to him by her, then the relation of landlord and tenant subsisted between them with reference to the premises until they

were fully paid for; and if such was the case, there could have been no adverse possession of the premises by him, the tenant against her, the landlord, however long it might have continued, although he never paid her a particle of such rent, or one cent of the price agreed on for them in the meanwhile. *Ang. on Lim., sec. 406; 4 Conn. 95; 12 Mass. 325; 6 Cow. 401; 1 Met. 267.*

Now, these facts and considerations clearly demonstrated that in neither aspect in which the case had thus been presented could there have been at any time an adverse possession of the premises in question by Cyrus S. Jefferson against his mother, Elizabeth Jefferson, until at least they had been fully paid for; but, on the contrary, that it had been from its inception a purely permissive possession on his part by her remarkable forbearance, indulgence, and consent; for, notwithstanding the testimony of one solitary witness to the contrary, altogether too strong to save it from suspicion and doubt, there was not a particle of proof that he ever paid her anything, and it was doubtless the sad conviction and consciousness of this melancholy fact on her part that prompted her at last to give it in such a solemn manner and in such a grave instrument as her last will and testament to her two young granddaughters named in it. He would only say further, in reference to the testimony of the witness just referred to, that it was very brief but very strong, and directly to the point, and could not possibly have been made any stronger or more directly to the point to be proved by it, for it purports to consist of an admission which he heard Elizabeth Jefferson make as far back as the year 1851, that her son, Cyrus S. Jefferson, had paid her two hundred dollars for the land, and that it had come at a very good time for her. But he is the only witness that ever heard her say that or anything like it, then or at any other time, for not one of her daughters, several of whom had been examined as witnesses in the case, had ever heard her say that he had ever paid her one cent for it. At least, neither they nor anybody else, except the solitary witness referred to, had proved any other single payment to her by him. And even he did not see the amount of money he mentioned paid, but only heard her say it had been, when nobody else was present, as the jury must infer, since no other witness has either directly or

indirectly corroborated his statement. There was another principle of law to which he would refer the court and then conclude, although he scarcely deemed it necessary to do it, and it was this: In an action of ejectment if the defense of adverse possession is set up, it is incumbent upon the defendant to establish it to the satisfaction of the jury; and if, on the whole evidence produced in the case, the jury are in doubt whether the possession was permissive or adverse, the title claimed by adverse possession must fail. 1 *Met.* 267; 5 *Met.* 173, 174; 4 *Conn.* 95.

Cullen, for the defendant; The possession of the premises by Cyrus S. Jefferson was adverse in its inception. The plaintiffs admit that it was lawfully and peaceably, and not wrongfully or forcibly, acquired against either the will or knowledge of his mother, and the evidence not only showed that possession of them with her consent under an agreement between them to buy them of her, but that he at once commenced and continued as long as she lived to occupy, use, and enjoy them as his own property with her knowledge and without objection on her part, and both by word and act openly claimed the complete and exclusive and sole ownership of them under the agreement during the whole of that time, or, in other words, from the year 1849 to the year 1863. And that possession given him by her under the agreement, with her subsequent sanction of the manner in which he was using them and claimed to hold and own them, constituted in fact a transfer of the property in and the ownership of them from her to him subject only to the personal and pecuniary claim which she had against him for the price of them, and which by an action at law and a recovery thereon might have been made a lien upon them. That was all the right or claim which then remained to her, although the formal legal title to the premises was still vested in her. And as it was admitted on the other side that he was thus put into the possession of the premises, no action of ejectment could be maintained against the defendant in the suit, who had lawfully succeeded to it under him, without a demand by the plaintiffs of the possession and legal notice served upon her to quit the premises. 13 *East.* 210; 24 *E. C. L. Rep.* 470. Where a party goes into

the possession of land under a color of title or with the intent to hold and claim it as his own, the possession is adverse, which is a claim of right. 5 *Cow.* 74, 92; 6 *Johns.* 46; *Ang. on Lim.*, secs. 410, 435; 9 *Johns.* 174; 18 *Johns.* 40; 1 *Cow.* 604; 8 *Cow.* 589. And where the bar of the statute begins to run in the lifetime of the ancestor, it continues to run from that time and is not suspended on his death.

Robinson, for the plaintiffs: The contention of the plaintiffs was that Cyrus S. Jefferson rented the premises of his mother under a verbal agreement merely to buy them and pay for them afterward, which he never did, and that the forbearance of the mother to compel him to pay or to proceed for any other reason to recover the possession of the premises from him did not affect or change the relation of landlord and tenant which commenced with and subsisted under the agreement between them as long as she lived; but if a tenant disclaims possession as tenant and claims by a right adverse to the landlord, it will dispense with the necessity for a demand of the possession or notice to quit before the action is commenced. 4 *Harr.* 518. But if he ever conceived the idea of repudiating that relation between them and setting up a claim to the ownership of the premises and an adverse possession of them as against his mother until several years after her death, how was it to be reconciled with the proof in the case that he went to Philadelphia after her death and tried to buy the share and interest of one of the devisees in the premises, or that he said on the same visit there to his sister, Mrs. Hubbard, that he owned but six feet of land one way and four the other in the world? That was too grave a matter to allude to jestingly or in any other than in a serious and thoughtful mood. Or with the further testimony of the same witness that she knew he paid her mother rent for the premises in 1851 and 1852, but when she asked him for rent in 1856 he replied that he paid the taxes and kept up the repairs and that was as much as he could do! He had then been in possession of the premises seven years, for Mrs. Teague, another daughter of the testatrix, had testified that he went into the possession of them in 1849, soon after her mother had told her that she had sold

them to him, and which, so far as the testimony showed, was before he had ever intimated any intention to repudiate his obligation to pay rent to his mother for them, for even then he did not deny that he owed her rent for them, but simply said in reply to her demand for rent that he paid the taxes and kept up the repairs and that was as much as he could do; and she also testified that he made the same reply every year afterward to her demand for rent, showing that she kept up her demand for it as long as she lived, and which clearly indicated that it must have been a part of the agreement between them that he was to pay her rent until the premises were paid for by him, and upon that point the testimony of the same witness that she knew he paid her mother rent for the premises in 1851 and 1852 was absolutely conclusive. But there was no proof that he ever paid any after that, although yearly demanded of him, until he had grown so bold in his bad and dishonest treatment of her and under her long forbearance and submission to it, as by the year 1857, or not later than the year 1859, to deny to her very face that he was bound to pay her any rent whatever, and to have one of his neighbors present on the very land itself to witness the disreputable fact which he had proved in his testimony that he utterly repudiated in express and emphatic terms addressed directly to her any obligation or agreement to pay her anything as rent for the premises. A more deliberate, pointed, and positive repudiation of the relation of landlord and tenant then subsisting between them in respect to the premises in question could not have been conceived or contrived than was enacted by him on that occasion. But in addition to that, he would call the attention of the court to the fact that it was again as distinctly and positively though indirectly repudiated by him in the mortgage of the premises afterward executed and delivered by him to Dr. Robert G. Ellegood given in evidence, and under which they were sold at sheriff's sale and bought by the mortgagee, and were now in the actual possession of the defendant in the action.

The Court, Comegys, C. J., charged the jury: That the plaintiffs and the defendant in the action, so far as their respective legal

rights to the premises in question were concerned and involved in it, both claimed to derive their right and title to them through and from one and same former owner of them in fee simple, Elizabeth Jefferson, deceased, the real plaintiffs in the action, Henry C. Barrett and Sabia C. Barrett, his wife, in right of his wife, and George F. Easton and Annie E. Easton, his wife, in right of his wife, under her last will and testament, in which she devised them to the said wives under their maiden names respectively, and before their marriage to their said husbands, as follows: "To Sabia C. Jefferson, daughter of my son, Cyrus S. Jefferson, and Annie E. Jefferson, daughter of my son, John W. Jefferson, to them, their heirs and assigns," and the real defendant in the action, Elizabeth A. Jefferson, the tenant now in possession of them, and who was in possession of them when the action was commenced, by virtue of an alleged holding of them by the said Cyrus S. Jefferson under a parol or verbal agreement entered into between him and the testatrix, the said Elizabeth Jefferson, his mother, in her lifetime, to buy them of her, and in pursuance of which he was put into possession of them by her in the year 1849, and that from that time he had continued to hold and own them as a purchaser and as his own property against her and the devisees named for more than twenty years before the action was commenced, and that he had thereby acquired such an adverse possession of them against her and the devisees named for more than twenty years as constitutes in law a good and sufficient defense in bar of the action. It is in evidence, and not disputed, that he continued in the peaceable and uninterrupted, if not the adverse, possession of the premises from the beginning or the early part of the year 1849 until they were sold by the sheriff of the county under a mortgage of them executed by him to Dr. Robert G. Ellegood, on the 13th day of November, 1875, and were conveyed to the purchaser by the deed of the sheriff pursuant to the sale, dated November 1st, 1877. The testatrix, his mother, Elizabeth Jefferson, made and executed her last will and testament on the 16th day of April, 1858, and which was duly probated on the 15th day of September, 1863, soon after her death.

The devise to her granddaughters, one of whom was the

daughter of her son, Cyrus S. Jefferson, under whom the defendant claims to have a good and lawful right to the premises by virtue of his long-continued adverse possession of them against his mother and her devisees for twenty years at least, contained in the will, implies, of course, not only a deliberate by a solemn assertion on her part of her ownership of the premises when it was made and executed by her, and also down to the time of her death, some five years and six months afterward, inasmuch as she retained it in the meantime subject to change or cancellation and left it unaltered and unrevoked at her death.

This defense of an adverse holding and possession of the premises by Cyrus S. Jefferson against his mother and the devisees under her will for the period of twenty years at least before the action was commenced, which was the 30th day of March, 1878, the plaintiffs expressly contradict and deny, and this is the main if not the only question to be considered and determined by the jury, subject to such instructions as the court is about to give in regard to the well-settled rules of law applicable to it in such a case as this. The plaintiffs have produced in evidence before the jury a complete and perfect and undisputed legal title in fee simple to the premises conveyed to and vested in Elizabeth Jefferson, the testatrix, by two deeds of bargain and sale made, executed, and delivered to her for them, the first by James Fletcher for himself and as attorney-in-fact for James L. Fletcher, dated the 20th day of June, 1835, and the second directly from James L. Fletcher himself, dated the 29th day of November, 1838, both of them duly acknowledged and recorded in the office of the recorder of deeds in the county, and her possession of the premises under them from the time of her purchase of them until 1849, when her son, Cyrus S. Jefferson, went into possession of them. And this is what is termed the legal paper title to premises like these, and which is (*prima facie*) always the best and strongest evidence that can be produced of a perfect legal title to any kind of real estate. Wherefore it is that the law has provided for the recording of such legal titles to real estate and made them public records, when recorded as provided for, and made such record of them when produced evidence *per se* of such legal title in all courts of justice and

elsewhere; while it is furthermore provided by statute that all contracts for the sale of lands, tenements, and hereditaments, or any interest in or concerning them, shall be reduced to writing, or some memorandum or note thereof shall be signed by the party to be charged therewith, or some other person thereunto lawfully authorized by writing, or no action shall be brought whereby to charge to any person upon any agreement or contract for such a purpose and although many parol or verbal agreements for such a purpose have under special or peculiar circumstances been recognized, both by courts of law and courts of equity, as proper exceptions to the broad and general requirement of the statute, nevertheless the wisdom and policy of both of the legal provisions referred to, as well as the reason and justice of the principle itself, are so strong and obvious that they have long since led to the establishment of the rule of law that whenever in an action of ejectment a claim of right by adverse possession of twenty years or more is set up by the defendant against the claim of right set up on behalf of the plaintiff by a clear and undisputed legal title such as we have just defined to the premises in controversy between them, the duty and the burden of establishing the defense of adverse possession against the legal title in such a case to the satisfaction of the jury always devolves and rests upon the defendant; and when the evidence in the case fails to prove it to their satisfaction or leaves it doubtful in their minds, it is their duty to find against such defense. There is also another positive law which has conduced to the establishment of this principle, and that is the statute which substantially provides nothing less than twenty years' adverse possession, that is to say, under a claim to hold and own it in his own right, by a defendant in an action of ejectment shall be sufficient to bar the claim and right of the plaintiff to recover the real estate sued for when the better and legal title to it is shown to be in him, and when such an adverse possession is set up and alleged and relied on by the defendant as his ground of defense against it and it is denied by the plaintiff, it becomes a question of fact between them to be determined by the jury on all the evidence before them for and against it. As the defendant has specially alleged and set it up as his ground of defense in the

action, of course the affirmative of the question rests upon him, and therefore he is justly and reasonably held to have assumed the obligation and the burden of proving and establishing his defense to the satisfaction of the jury, and if he fails to do that, on all the evidence before them upon the question, they must find against the defense so set up and sought to be proved and established by him.

The defense is that Cyrus S. Jefferson entered into the possession of the premises in 1849 under an agreement with his mother to buy them of her, and that he continued to hold, use, and enjoy them as his own until he had acquired an uninterrupted adverse possession of them of twenty years at least against her and her devisees before this action was commenced, and that the plaintiffs are consequently barred by it. No evidence whatever in writing of the alleged agreement had been produced, not had any of the terms of it been proved or made known by the defendant in any manner to the court and jury, not even the price to be paid for them, or when or within what time, or how it was to be paid, except that he was to buy them from her. And the only evidence before the jury in relation to it was the testimony of the witness, Mrs. Teague, a daughter of the testatrix and a sister of Cyrus S. Jefferson, that her mother told her a short time before he moved on the premises, that she had sold them to him, and the testimony of the witness, William Fleetwood, that he heard Mrs. Elizabeth Jefferson say in 1851 that her son, Cyrus S. Jefferson, had paid her two hundred dollars for the land, and that it had done her a good deal of good.

Now, with this evidence in the case, slight and limited as it is with regard to his taking possession of the premises under an agreement to buy them of her, taken in connection with the further evidence that he afterward lived and acted on them as any purchaser of them would, and held, used, and enjoyed them as if he was the actual owner of them in his own absolute right, the jury would be warranted in inferring from it, if there were no other evidence in the case, that he had bought them of her; for supposing it contained no other terms, brief and incomplete as it was, it imparted an agreement for the transfer of the own-

ership of the premises from her to him under which she had delivered the possession of them to him upon an indefinite credit, as well as an uncertainty as to the price to be paid for them. And if so, and that was all there was in the agreement, then his possession of the premises would be considered in law to have been adverse from the beginning as to her, and the only right which remained to her with reference to them was to the price to be paid to her as the consideration for them. By the delivery of the possession of them to him under such an agreement, she had performed all that was to be done on her part, except to formally convey them by deed of bargain and sale to him on being paid in full the price of them.

But there was further evidence in the case to be considered by the jury on which the counsel for the plaintiffs had contended that the agreement, which was merely a verbal one, must not only have stipulated the price to be paid for the premises, but that it must have further stipulated that Cyrus S. Jefferson was to pay his mother annually a portion of the crops produced on them as rent for the premises in the meantime in lieu of interest on the price of them until it should afterward be paid in full by him, and that the price never was paid by him in her lifetime or afterward; and accordingly that the legal relation of landlord and tenant with respect to the premises subsisted between them as long as she lived, and between him and her devisees until he was divested of the possession of them by the sale on the mortgage offered in evidence and the sheriff's deed under it; and if so, then Cyrus S. Jefferson never had and never could have acquired any adverse possession of the premises against either his mother in her lifetime or her devisees after her death.

In charging you upon this point we shall not repeat the argument of the counsel for the plaintiffs or recite the evidence in the case on which they rely to establish the fact that in the agreement under which Cyrus S. Jefferson acquired the possession of the premises from his mother there must have been a further stipulation on his part to pay her rent for them, alleged by them, and that the relation of landlord and tenant subsisted between them from the beginning with respect to them, for it is all before

you, and will require but a few brief references to it by us as to the legal effect of it in case you are satisfied as to the truth of it and as to the presumptions that may be drawn from it by the jury. And we will, therefore, merely say in the first place that there is no direct evidence before the jury that there was such a stipulation in the agreement, but the relation of landlord and tenant between the person who owns and the person who occupies the premises in question may be proved and established to the satisfaction of a jury in a trial like this by acts or facts which clearly show it, as well as by direct evidence, and the payment of rent for the premises occupied by one person to another, and so received by the other, has always been considered the strongest kind of evidence of that character to prove that the relation of landlord and tenant by the recognition of both parties then existed between them as to the premises, for which it was paid by the one and received by the other. And we must, therefore, say to you that if you believe the testimony of the witness, Ann G. Hubbard, a daughter of Elizabeth Jefferson, the testatrix, under whose will the plaintiffs claim title to the premises, and a sister of Cyrus S. Jefferson, and are satisfied from it, after hearing all the other evidence in the case, that he paid his mother rent for the premises in 1851 and 1852, it would amount in fact, if that was so, to an admission or recognition by him, and would be strong evidence to prove that the relation of landlord and tenant subsisted between them with reference to the premises during the years of 1851 and 1852; and, furthermore, if the jury believed her testimony and were satisfied from it, as before stated by us, that her mother asked him for the rent in 1856, and he replied that he paid the taxes and kept up the repairs and that was as much as he could do, and that her mother received the same reply from him on asking him for the rent every year afterward, it could not be construed into a renunciation or repudiation of that relation as before admitted and recognized by him in 1851 and 1852, for he did not deny in 1856 or on any occasion afterward when he made the same reply to his mother's demand for rent that he had rented the premises of her, or say that he had bought them of her and paid her for them, but it amounted at best to a bad excuse merely for

both his failure and refusal to pay her the rent for them because he was not able to do it and pay taxes and keep up the repairs, and merely excusing himself from complying with her demand on that or any other ground would imply a recognition instead of amounting to a repudiation of his obligation to pay her rent for the premises. And although he may have paid her no rent after that, or none after 1852, the testimony to which we have just referred, if true, not only affords strong direct evidence that the relation of landlord and tenant actually existed by mutual consent between them up to 1856 at least but it also affords at the same time strong presumptive evidence that it was a part of the understanding and agreement between the mother and the son, the parties to it, when in 1849 he entered into possession of them, that he was to pay her rent for the premises until he was able to pay her for them the price agreed on between them, whatever that may have been. And if that was the case and it was true that she continued afterward to demand the rent annually from him as long as he lived, it afforded strong circumstantial evidence that the relation of landlord and tenant as to the premises so established between them was never afterward dissolved or terminated with her consent.

Upon the ground that there was such an agreement and such a renting of the premises under which Cyrus S. Jefferson was put in possession of them by his mother, Elizabeth Jefferson, the counsel for the plaintiffs had contended that his possession was not adverse, but having commenced with her consent and under the terms of such an agreement between them, it was what is termed a permissive possession, and could not have become an adverse possession, but continued a permissive possession so long as he continued to hold them under the agreement to pay rent for them, although he had paid her no rent for several years before her death, and as his agreement to buy them was executory purely in its character, and was entirely subject to his future will and pleasure, and he had not paid her for them and had never performed his agreement to buy them, his possession of them never could have become that of a purchaser of them, or thereby adverse to the right and title of his mother to them. If such were the facts and the proof in

the case, and there was nothing further to vary or modify them, the principle and conclusions of law just stated with reference to them would unquestionably apply to them; for if the jury were satisfied from the evidence that when Cyrus S. Jefferson took possession of the premises under an agreement to buy them of his mother it was further understood and agreed between them that he was to pay her rent for them until he did so he was bound by it, and as it constituted one of the terms on which he took possession of the premises with her consent it established from the beginning the relation of landlord and tenant between them as to the premises, and so long as that relation continued he could not acquire any adverse possession of them by failing or neglecting to pay the rent to her pursuant to their agreement.

But the counsel for the defendant has contended that if there was such an agreement and renting of the premises by Elizabeth Jefferson to Cyrus S. Jefferson, and the relation of landlord and tenant thereby existed between them, that it was afterward terminated and ended by his express and unequivocal repudiation of it, and that from that time his possession of the premises became adverse, and so continued to be as long as he held them afterward. The only testimony before you on that point was that of Noble Connaway that he heard a dispute between Cyrus S. Jefferson and his mother on the premises in 1857 or 1859, when she told him to give her an ear of corn as rent for the land, and that he said he would not do it, but if at any time she wanted an ear of corn from the land she might take it and put it in her pocket, but not as rent, for if she claimed it as rent he would take it out of her pocket; and with reference to which we must say that if you are satisfied of the truth of that testimony that it was direct and positive evidence of an express and unequivocal repudiation by him on that occasion of his obligation to pay her rent for the premises and of his relation as tenant of them to her, and if he never did anything after that to recognize the relation as existing nor made any acknowledgment of it in any other way his possession of the premises from that time became adverse, and her only recourse then was to institute proper legal proceedings against

him to recover from him the possession of them if her object was to repossess herself of them. She could, however, at any time within twenty years after that adverse possession on his part had thus commenced against her, had she lived so long, have instituted an action like this against him or the present defendant for that purpose. But as the twenty years' limitation of the action commenced running against her from the time the cause of action accrued several years before her death, and was not arrested or suspended by it but has since continued running against her devisees, the plaintiffs in the present action, it will be for the jury to consider and determine from the evidence whether the defendant has established to your satisfaction his defense of an adverse possession of the premises by Cyrus S. Jefferson and those under whom the defendant claims of at least twenty years' continuation before this action was commenced. If he has not, the verdict of the jury should be in favor of the plaintiffs; if he has, then in favor of the defendant. The action was commenced on the 30th day of March, 1878. Cyrus S. Jefferson's repudiation of his relation as tenant of the premises to his mother as stated in the testimony of Noble Conaway was in 1857 or 1859. Does that establish the defense? To do that the jury must be satisfied that the dispute referred to and related by the witness must have occurred before the 30th day of March, 1858.

The defendant had a verdict.

DAVID MILLER, defendant below, appellant, *v.* EDMUND HOLDING, plaintiff below, respondent.

The court will not dismiss an appeal for want of form as prescribed by the statute, because the condition of the surety in it was "that the said appeal shall be prosecuted with effect, and that any judgment which shall be rendered against the said defendant or his executors or administrators upon said judgment shall be satisfied," instead of "and that any judgment rendered against the said David Miller, his executors or administrators, upon said appeal shall be satisfied."

AN appeal from a judgment given by George B. Dickson, a justice of the peace. The transcript filed was as follows: "Action of *Assumpsit* for the services of a stallion. Demand twelve dollars. December 14th, 1878. Both parties appeared, and after hearing the proofs and allegations of the plaintiff and defendant, judgment is hereby given against David Miller, the defendant, in favor of Edmund Holding, the plaintiff, for the sum of ten dollars debt and six dollars and seven cents judgment cost. GEORGE B. DICKSON, J. P. Same day, December 14th, 1878, the said David Miller appeals and Dr. Isaac Jump becomes surety in the sum of fifty dollars that the said appeal shall be prosecuted with effect, and that any judgment which shall be rendered against the said defendant or his executors or administrators upon said judgment shall be satisfied.

"Attest: GEORGE B. DICKSON, J. P. ISAAC JUMP."

And this was followed by the certificate of the justice in regular form.

J. P. Saulsbury, for the plaintiff below, now made a motion to the court to dismiss the appeal because the entry of it by the justice was not in accordance with the form prescribed by the statute, which must be strictly followed. In the first place, it does not state the name of the appellant, and in the second place, it does not state that any judgment which shall be rendered against the said Miller, his executors or administrators, upon said appeal shall be satisfied, but states that any judgment which shall be rendered against the said defendant, his executors or administrators, upon said judgment shall be satisfied. This court has no power to amend a record unless it is authorized by statute. *Latham v. Edgerton*, 9 Cow. 227; *Ex parte Alvord et al.*, 6 Cow. 585; 4 Cow. 592. When the appeal bond is defective in any case, the Court of Common Pleas may quash the appeal at any time. *Ex parte Brown*, 7 Cow. 468. In this case the surety in the appeal signed the entry on the record of it as it was made by the justice of the peace, and it is not competent for this court or the justice either to alter or vary it by any amendment, for that would be to change the contract and the legal obligation of the surety in the case,

which cannot be done. When the transcript from the justice's record fails to show upon its face that an appeal was taken and security was given as required by law, it is fatally defective, and is therefore null and void in law. And as the giving of security and the entry of the appeal here in all respects in strict conformity with the requirements of the statute is absolutely essential to give this court jurisdiction of the appeal in any case, if that is wanting the court can do but one thing in the case, and that is to reject or dismiss the appeal. But the appellant is not without redress or remedy in such a case against the justice of the peace.

Fisher, for the defendant below: The court ought not to dismiss an appeal because the justice has failed to furnish a duly certified transcript under seal, notwithstanding the statute requires the appellant to have the appeal entered in the Superior Court on or before the first day of the next term, and for that purpose to deliver a duly certified transcript of all the docket entries in the case to the prothonotary of the court, but will direct that a duly certified transcript be filed during the term. *Green v. Kinney*, 2 *Harr.* 160; *Lewis v. Hazel*, 4 *Harr.* 470; *Waters v. Kirby*, 1 *Houst.* 364. The court will not dismiss an appeal because of a defect in the bond or entry of security by the justice, unless the appellant after having been required to execute a new bond or to have the defect corrected shall refuse or neglect to do so, and the court will allow the defect to be corrected by making such an order. *Dedman v. Barker*, 1 *Scam.* 254; *Jones v. Davis*, 4 *Mo.* 28; *Craddock v. Pritchett*, *Peck* 22; *King v. Hampton*, 3 *Haywood* 60; *Cochran v. Parker*, 6 *S. & R.* 549; *Carter v. Pritchard*, 11 *Ala.* 673. The court may in its discretion allow amendments of the appeal bond after motion to dismiss; and it is error if the court refuse to permit the appellant to file a sufficient bond. *Twidall v. Meeker*, 1 *Scam.* 137; 1 *Halst.* 220; 3 *Halst.* 135; 7 *Halst.* 181; *Dedman v. Barker*, 1 *Scam.* 254. The appeal cannot be defeated by the neglect or fraud of the justice. *Little v. Swift*, 4 *Scam.* 400; *Ewing v. Bailey*, 4 *Scam.* 420. A party ready and willing to comply with the prerequisites to an appeal can-

not be deprived of his right to it by the willful or accidental omission of the justice. *Louderback v. Boyd*, 1 *Ashm.* 380; *Swift v. Brownell*, 4 *Wis.* 285; *Lacy v. Fairman*, 7 *Blackf.* 558. It is error to dismiss an appeal from a justice of the peace on account of defect in the appeal bond when the appellant offers to execute a new and sufficient bond without delaying the trial. *Appleton v. Turrentun*, 19 *Ala.* 706.

The Court refused the motion to dismiss the appeal.

ABIGAIL RUSSELL v. GEORGE W. BENNETT ET AL.

If on the sale upon a *scire facias* on a recognizance taken in the Orphans Court in proceedings for the partition of the real estate of an intestate, in which the widow waives the assignment of her dower therein and elects to take in lieu of it the interest during her life on the one-third of the amount for which it was sold at trustee's sale in pursuance of the proceedings in that Court, and owing to the great depreciation of it in the meantime it sells for less than the real sum for which the recognizance was so taken, the Superior Court will, on the return of the writ and the paying of the money into that court by the sheriff, order the entire amount of it, minus the costs, to be loaned on approved security with the interest thereon to be paid to the widow during her life and the principal thereof at her death to the administrator of the intestate, or as the court may otherwise direct.

THIS case came up on the return of the sheriff of the county to a sale on a *scire facias* upon a recognizance in the Orphan's Court entered into by David W. Bennett, purchaser of the lands and tenements of his father, George Bennett, deceased, who died intestate, at the trustee's sale on the confirmation of it in the proceedings for the assignment of dower therein to the widow, and the partition of the residue thereof among the heirs-at-law of said deceased, in the said court, and of the proceeds of the sale of the said lands and tenements on the said *scire facias* in the hands of the said sheriff paid by him into this court for further investment, pursuant to the statute in such case made and provided. The real debt of the recognizance was

four thousand and twenty-five dollars, with interest from the 21st day of September, 1860. In the proceedings in the Orphans' Court, Abigail Russell, late Abigail Bennett, the widow of the said George Bennett, deceased, but who has since married Mr. James Russell, waived the assignment of her dower by metes and bounds in the said lands and tenements, and as the residue thereof would not divide without detriment among the heirs-at-law of the said intestate, and would accordingly be ordered to be sold at a trustee's sale for their use and benefit, she elected to take in lieu of her dower the annual interest on an equivalent share, or the one-third part of the purchase-money for which the whole of the said lands and premises should be sold, free of dower, for the term of her natural life, the same to be secured to her by the purchaser thereof at such trustee's sale by recognizance in said Orphans' Court, as provided by law, and the principal of which in this case amounted to one thousand three hundred and forty-one dollars and sixty-six and two-thirds cents, or the one-third of the said sum of four thousand and twenty-five dollars for which the same were sold after deducting all the costs of the said proceedings in the said court. But on the sale of the said lands and tenements by the sheriff under the *scire facias* on the said recognizance the proceeds amounted only to one thousand two hundred and twenty-five dollars, which was brought into court by him for the purpose before stated, and which amount would be subject to a further reduction for costs in this case to the sum of one thousand one hundred and twenty-five dollars and sixty-three cents.

There was at the same time a petition presented on behalf of George W. Bennett and Hester A. Bennett, two of the children and heirs-at-law of the said intestate, George Bennett, deceased, for the partition and distribution of the fund so paid into court by the sheriff among the several recognizees, including the widow and the heirs-at-law, according to their several and respective shares and interests in it, upon the ground that the election of the widow to take the interest on one-third of the proceeds of the sale of the real estate of the said intestate, her deceased husband, for and during her life, in lieu of the assignment by metes and bounds to her of the one-third part of the said real

estate for the term of her life, as and for her dower therein, was her own free and voluntary act, and as such she was bound by it and was not entitled to relief against any loss which had resulted from the subsequent depreciation and sale of the land which she had thus elected to substitute as the only security for the payment of it pursuant to the tenor of the recognizance; or, in the next place, that if she was to be considered to be entitled to a portion of the net sum for which the lands had been sold under the *scire facias* on the recognizance, and is now in this court, she was estopped from claiming any more of it than her election as widow would give her, and when she came under that election into this court for her proportion of it, she could only claim her proportionate part of it, namely the one-third of it, or rather the interest on the one-third of it during her life, after it shall have been so invested under the order of this court.

A petition was also presented on behalf of Mrs. Russell, the widow of the said intestate, praying the court to order the whole of the said fund to be loaned and invested under the late statute, on good security to be approved by the court, the interest thereon to be paid to her during her life, and the principal thereof at her death to the parties respectively who might then be lawfully entitled to it, inasmuch as the entire amount of it was considerably less than the original fund secured for her use and benefit as said widow, under and by virtue of the said recognizance in lieu of the actual assignment of her dower by metes and bounds in said lands and tenements of the said intestate, and as her just and lawful equivalent or substitution for it.

The petitioners were represented by their respective counsel in the case, but as both the facts and their arguments in it sufficiently appear in the opinion of the court, no report of them is here given.

Houston, J., delivered the opinion of a majority of the court: In this case the lands bound by the recognizance and sold under the *scire facias* issued upon it for less than the one-third of the principal of it, the amount of the sale being one thousand two hundred and twenty-five dollars after deducting the costs to which it is legally subject in this court, and should be invested we think,

for the benefit of Abigail Russell, late Abigail Bennett, the widow of the said George Bennett, deceased. In the proceedings in the Orphans' Court for the partition of his real estate, she, as his widow, having waived the assignment of her dower by metes and bounds, united with the heirs-at-law in the application for the sale of it, and in lieu of her dower by assignment out of his lands elected to take in money the annual interest on one-third of the proceeds of the sale after deducting costs for and during the term of her natural life, the payment thereof to be secured to her by the purchaser by his recognizance on the lands to be taken and approved in that court as provided for by the statute. It appears by the record of the proceedings in that court that the sale of the lands was ordered and made, that David W. Bennett became the purchaser of them, and as such entered into recognizance in the real debt of four thousand and twenty-five dollars, that being the net amount of the sale after deducting the costs, to pay her as the widow of the intestate, George Bennett, deceased, the annual interest for the term of her life on the one-third of it, amounting to one thousand three hundred and forty-one dollars and thirty-six cents, and the principal of that sum at her death to the administrator of the intestate or as that court should otherwise order and direct, and also to pay the other two-thirds of the said sum of four thousand and twenty-five dollars to the parties respectively entitled thereto, or, in other words, to the heirs-at-law of the said intestate, with interest thereon in one year from the date of the recognizance. And this is what is termed in the language of the statute the election of the widow "to take, in lieu of her dower by assignment by metes and bounds in the lands and tenements, an equivalent share of the proceeds of the sale of the whole of the intestate real estate," and the recognizance is made a specific lien on the whole of it, as much for her benefit and security as that of any other party entitled under it. The inflation of prices at the time the land was sold under the order of the court was not alone the cause of the depreciation in the price for which it recently sold under the *scire facias* on the recognizance, but the wood and timber on it which the recognizer had in the meantime cut and disposed of had contributed in no small degree to it.

Under and by virtue of the recognizance and the law under which it was taken, and which must still govern the fund arising from the execution and sale under it, no party under the recognizance can be entitled to any portion of the one thousand three hundred and forty-one dollars and thirty-six cents, the one-third of the net amount for which it was taken, nor can have any claim to be paid any part of it during the lifetime of the widow or until after her death, for whose sole and exclusive benefit it was thus invested to secure her the interest on it during her lifetime in lieu of dower by metes and bounds and the rents and profits of it by assignment of dower to her in the one-third part of the land; but on her death the parties in reversion will be entitled to have the principal of it paid to them in their just and respective proportions pursuant to law and the tenor of the recognizance, and they will ultimately be the then surviving children and heirs-at-law of the intestate, George Bennett, deceased, or their legal representatives. And therefore it would not only be in strict accordance with the provisions and requirements of the statute on the subject, but it would be better for the parties thus entitled, that the net amount of the fund for which the land sold on the recognizance, to wit, one thousand two hundred and twenty-five dollars after deducting the legal costs to which it is subject in this suit, should be invested for her benefit for the term of her life, and after her death to be distributed and paid to the parties so entitled to it in reversion, since that is all they are entitled to according to law, so far as this fund is concerned; and inasmuch as it is less than the amount of her equivalent share of the proceeds of the original sale of the land, one thousand three hundred and forty-one dollars and thirty-six cents, so invested under the recognizance, she, of course, loses by the depreciation in the recent sale of the land, as well as the parties entitled over to the principal of this impaired and reduced fund on her death, but by so investing it the loss would be fairly and justly apportioned between them, particularly as the latter are at present entitled to no part of, either the principal or the interest on it, and cannot be until her death, according to law.

Such being the case, there is an application to the court, however, to distribute the proceeds of the sheriff's sale of the lands under the recognizance among the several recognizees according to their several and respective interests, without declaring in express or explicit terms, but rather in an argumentative and alternative manner, how it is to be apportioned between them; for, in the first place, it is suggested that although the law favors dower according to the well-known maxim of the common law as announced by Lord Coke, that there are three things which the law favors, life, liberty, and dower, the election of the widow to take the interest on one-third of the proceeds of the sale of all the real estate of the intestate, her deceased husband, in lieu of and as the equivalent of her dower by metes and bounds therein, was her own free and voluntary act, and as such she was bound by it, and she is therefore not entitled to relief against any loss which had resulted from the subsequent depreciation and sale of the lands bound by the recognizance; or, in the next place, if she is to be considered to be entitled to a portion of the sum for which the lands sold under the *scire facias* on the recognizance and is now in this court, she was thereby concluded and estopped from claiming any more than her election gives her, and when she comes under her election into this court for her proportion of it, she can only claim her proportionate part of it, namely, the one-third part of it, or rather the interest on that one-third part of it, there being the sum of one thousand and eleven dollars and eighty-three cents due to her for interest in arrear on the recognizance from the recognizor at the time when this application was presented.

But all this proceeds on the assumption that the sale of the land on the recognizance extinguished it entirely, and at once converted the proceeds of the sale under it into a common fund for immediate and final distribution among all the parties entitled under it in their respective shares and proportions, including the interest of the widow for her life in it, as well as the interests of all the parties secured by it. This, however, was not the operation or effect of the sale on the one-third secured by the recognizance for the benefit of the widow in lieu of her

dower by metes and bounds in the lands, either as to the widow during her lifetime or as to those who may be entitled to receive the principal of it at her death; because that would not only be utterly repugnant to the whole scope and object of the provisions of the statute just referred to, the policy of which is not only to encourage and protect widows in waiving the assignment of their dowers by metes and bounds, and taking in lieu thereof the interest on the one-third of the purchase-money for the land when sold for the term of their lives, and as much for the benefit of the heirs-at-law as for their benefit; but it is expressly provided against and prevented by a later statute which the legislature in its wisdom soon found to be necessary to meet just such a contingency as this, and which accordingly provides, among other things, that where there is any lien by a recognizance with a condition for the payment of interest to one or more persons during their lifetime, and the principal at their death to some other person or persons, in all cases of the sale by virtue of execution process of the real estate bound by such recognizance, such part of the proceeds of said sale as shall be legally applicable to such lien shall be paid into the court out of which the said process issued, and shall be invested by the said court or otherwise disposed of for the benefit of the parties interested as shall be just and proper under the circumstances; and such payment into court shall discharge the officer selling the property from all liability for the money so paid. *Rev. Code Amended, sec. 2, page 682.* Since the enactment of that statute there have been payments made into this court in each of the counties of the State under this particular provision of it, and the money in such cases has always been invested by loan for the benefit of the parties interested, that is to say, to pay the interest on it annually to the widow during her lifetime, and the principal at her death to the parties entitled to receive it pursuant to the provisions of the original statute under which the recognizance was taken. And how could it properly be done with due regard to the just and legal rights of all the parties concerned in any other manner, since the widow is legally entitled to receive no part of the principal but only the interest on it during her lifetime, while none of the other parties

in interest are legally entitled to receive any part of either the principal or the interest until after her life has terminated? She alone sustains for the present and during her lifetime any loss by the depreciation of the land and the reduction of the capital sum thus secured for her benefit in lieu of her dower by metes and bounds in it, while they practically sustain no loss whatever by it so long as she lives, but take all that remains of it minus the interest on it in the meantime when she dies; and as neither she nor they are responsible for the loss, it would be just and equitable then to apportion it between them by loaning the amount paid into court by the sheriff, after deducting all the cost to which it is legally subject in this court, the interest upon it to be paid to the widow, Mrs. Russell, annually during her life, and at her death the principal to be paid to the parties then entitled to receive it pursuant to the tenor of the recognizance and the intention and design of the statute under which it was taken, and also of the subsequent act to which we have before referred, as far as it is practicable to carry into effect the meaning and intention of both statutes under the circumstances.

But the cases to which we have before referred of money brought into the Superior Court in the several counties of the State for reinvestment under the particular provisions of *section 2, page 682*, of the *Revised Statutes*, before cited, though similar have varied in one respect from the present case, since in none of those cases, with the exception of one, we believe, did the sale of the land bound by the recognizance on execution process in the hands of the sheriff fail to realize a sufficient sum to satisfy and pay the whole amount of the recognizance, and that was the case of the sale of the lands of George L. Calley, returned to the Superior Court in and for Kent County, at the April term, 1876. In that case Peter L. Cooper, sheriff, presented his petition to the court, stating that by virtue of a writ of *venditioni exponas* to that term at the suit of John S. Jester, administrator of William M. Jester, deceased, against Andrew J. Calley, George L. Calley, and Manlove H. Calley, he sold the lands of the said George L. Calley for the sum of six hundred and fifteen dollars (\$615), and that among the liens to which the lands were subject was the lien of a recognizance entered into

by the said George L. Calley together with the said Andrew J. Calley and one John Woodall, in the Orphans' Court of the said county, on the occasion of the sale and assignment of the intestate real estate of one Elisha Maloney, deceased, and which were purchased by and assigned to the said George L. Calley. That the amount of the said recognizance was the sum of seventeen hundred and twenty-five dollars (\$1,725), and that the one-third part of said recognizance, being the sum of five hundred and seventy-five dollars (\$575), was made payable at the death of Amelia Maloney, widow of the said Elisha Maloney, deceased, to the heirs-at-law of the said Elisha Maloney, deceased, or to the parties entitled thereto at the death of the said Amelia Maloney, the interest thereon in the meantime being payable to her during her life, and that the said recognizance was the first lien against the said George L. Calley on the said lands so as afore-said sold by him by virtue of the said writ of *venditioni exponas*; and that there remained in his hands as the proceeds of the sale of said lands, after deducting the sum of six dollars and fifteen cents (\$6.15), his commission on said proceeds, the sum of six hundred and eight dollars and eighty-five cents (\$608.85). That as to the sum of thirty-three dollars and eighty-five cents (\$33.85), being the residue of the said sum of six hundred and eight dollars and eighty-five cents (\$608.85), after abating therefrom the amount of the said recognizance payable after the death of the said Amelia Maloney, there were conflicting claimants. The petitioner therefore, in conformity with the provisions of the law in that behalf, brings and pays into this court the said sum of six hundred and eight dollars and eighty-five cents (\$608.85), and prays that the court will dispose of the same as shall be just and proper under the circumstances.

It further appears by the record of the case that at the April term, 1877, of the court, Minos Connaway presented a petition to the court to borrow the said sum of five hundred and seventy-five dollars (\$575) so deposited by the said sheriff and applied to the said recognizance, and which represented the one-third part of said recognizance upon which the said Amelia Maloney, widow of the said Elisha Maloney, was entitled to the interest during her life, the principal thereof being payable at her death to the heirs-

at-law of the said Elisha Maloney, or to the parties then entitled to the same, to be secured by his bond with Mary K. York and John W. Fennimore as his sureties, for the sum of five hundred and sixty-nine dollars, after deducting the costs of this proceeding, conditioned for the payment of the interest thereon to the said Amelia Maloney annually during her natural life, and the principal thereof at her death to the heirs-at-law of Elisah Maloney, deceased, or to the parties entitled to the same, or otherwise, as the court may direct. And at the following October term, 1877, of the court the prayer of the petitioner was granted, the proper order for the purpose was made, and the said sum of five hundred and sixty-nine dollars (\$569) was so loaned to him by the court on the bond and security and the condition just stated. In that case the recognizance was taken on the 27th day of September, 1859, and the land bound by it was sold on a judgment subsequently recovered in the Superior Court for the county against the recognizor and the other defendants named in the writ of *venditioni exponas*, and the depreciation and loss on the sale of the land under it was not a great deal less than the depreciation and loss which occurred on the sale of the land on the recognizance in the present case, comparatively speaking.

The point has been presented in the argument of the counsel for the other recognizees that if the widow is now entitled to the interest for the term of her life on any part of the fund paid into court in lieu of her dower in the land, it can only be the interest on the one-third of it for the term of her life, and that the remaining two-thirds of it should be distributed and paid forthwith to the other recognizees, but this court has no power or authority to do that, or to reform the recognizance in this or any other respect; besides, as we have before remarked, the latter parties never have been and never can be entitled to receive any part of the principal of the third of this recognizance, amounting to the sum of thirteen hundred and forty-one dollars and sixty-six cents, the one-third of the proceeds of the original sale of the intestate real estate of her deceased husband, which was reserved and secured by it on the lands in the hands of the recognizor for her benefit so long as she lives. On the death of her husband and when she waived the assignment of her dower

by metes and bounds, she was entitled in law to a freehold estate for the term of her life in the one undivided third part of all his lands and tenements as and for her dower therein and as a purchaser thereof for a valuable consideration, and which was paramount to any right or title which the heirs-at-law then had in and to the same; and hence we hold that it is but just and reasonable to conclude in this case that she has a paramount right over the heirs-at-law to the benefit of the whole fund and every part of it which she elected to take in lieu of and in exchange for it as her equivalent share out of the proceeds of the sale of it free of dower, that is to say, the interest on it as long as she lives. As to the distribution of the principal of it on her death, that is not a matter now for the consideration of this or any other court. If some of the heirs-at-law have already been paid by the recognizor their full shares of the two-thirds due to them in her lifetime under the recognizance, and some have been paid nothing, while others have only been paid in part what is already due them, it may on her death present a question for grave consideration how the principal of the other and remaining third is to be distributed between them.

Comegys, C. J., dissented, upon the ground that the election of the widow placed her, with respect to the fund, on the same footing with regard to the depreciation of it as the other parties, her claim not being so *favoured* in law as to entitle her under the circumstances to any superior equity; that the fund in court is not the *one-third* of the recognizance or any part of it for the purpose of the decision, but is the balance of the *whole* secured by the sale; that it is, in truth, the unpaid *interest* which the widow as well as those representing the heirs had allowed to accrue, and is not strictly *capital* to be invested at all under the statute; and that the *waiver* of the widow, being an act for her benefit or she would not have made it, placed her upon the same *equality* as the others, which is *equity*; that the language referred to in the opinion of the court has no application to a widow's status in this country, but had only reference to her freedom by the common law of England from certain duties that pertained to male owners of real estate, specified by Lord

Coke in his first chapter on the law of dower, and not to advantages over the husband's heirs, usually her own children; and that her surrender of her right of freehold and election to have the purchase-money of the whole secured in one recognizance, operated a consent on her part to share with the other parties entitled the risk of shrinkage of the entire fund.

Cullen, for Mrs. Russell.

Robinson, for Bennett *et al.*

THE SMYRNA BUILDING LOAN ASSOCIATION *v.* JOSEPH E.
WORDEN and ALICE E. WORDEN.

The defendant in a *scire facias* on a mortgage became the purchaser of the premises at the sale, but failed to comply at the return of the writ, and the day before the sale of them on the *alias sci.* them to his mother for a year and was paid the whole rent in advance, the plaintiff in the writ then became the purchaser of them without any notice or knowledge of the lease. It was held to be a fraudulent artifice that would not prevent the issuing of a writ at the return term to put the purchaser in possession of the premises.

RULE to show cause wherefore a writ of *habere facias possessionem* should not issue granted on the petition and affidavit of the plaintiff in the rule, which stated that by virtue of a writ of *alias levare facias*, No. 59, to this term of the court, the sheriff of the county had sold on the 17th day of January last at public sale, all that certain lot, piece, and parcel of land situate on Commerce Street, in the town of Smyrna, etc., containing forty-four thousand nine hundred and fifty-five square feet of ground, with a bucket factory and saw-mill erected thereon; that at the said sale the plaintiff became the purchaser thereof at the sum of seventeen hundred dollars, and that the sheriff had duly returned said writ to this term of the court, express reference being therein made to the same and the return thereof and to the mortgage and the prior proceedings had thereon in

.

this court. And further, that the said Joseph E. Worden is unwilling to surrender the possession of the said premises, and alleges that he has leased the same to his mother, Alice E. Worden, for the term of one year commencing on the 1st day of March, 1879, and which alleged term commenced after the day of said sheriff's sale and after the title of the purchaser accrued under it. Wherefore the rule was laid prayed for in the case.

R. Harrington, for the defendants in the rule, showed cause and contended that the only question involved in the consideration of it was whether the lease had been made and accepted in good faith by the parties to it, and without any intent to defeat or delay the delivery of the premises to the purchaser on the return of the sale and the confirmation of it by the court.

Massey, for the plaintiff in the rule, contended that it was made with that intent, was characterized by bad faith, and was consequently fraudulent and void. *Baker v. Burton and Hickman*, 3 *Houst.* 10. The testimony on the hearing of the rule was that the lease was executed and bore date on the 14th day of November, 1878, that the rent reserved was four hundred dollars, and that the whole amount of it was paid in advance on that day by the lessee to the lessor, of which the plaintiff, who was the purchaser, had no notice or knowledge at the time of the sale.

The Court: At the preceding sale of the premises by the sheriff returned at the last term of the court, Worden himself became the purchaser of them, but he failed to comply, and on the eve of the second sale he made the lease of them in question to his mother for one year, the whole rent then being paid to him in advance by her, the object of which must have been, like his former conduct by which he rendered nugatory the first sheriff's sale, anything but just or fair toward his creditors; but to make it still more reprehensible, unjust, and fraudulent in its character and design, to evade and defeat the ends of justice in the due course of the administration of it by law, and the final process of this court, it was done at that late moment

for the purpose apparently of preventing the plaintiff or any other person learning of its existence until after the day of the second sale, for it is in proof that the plaintiff, who then became the purchaser of the premises, had no notice or knowledge whatever of the lease on the day of the sale. And as it is mill property, combined with a bucket factory, of which the mother, the lessee, has no possession which it would subject her to any personal inconvenience to be removed from, we make the rule absolute.

Ex parte CHARLES H. B. DAY, Trustee of MARTHA J. ALLEE.

A purchaser of intestate lands under proceeding for the partition of them in the Orphans' Court entered into recognizance to pay the interest on the one-third of their value to the widow during her life, and the principal at her death to the parties entitled, and the other two-thirds to the parties entitled with interest at the expiration of one year from the date of the recognizance, against whom judgments were afterward obtained in the Superior Court, on which all his lands in the county were sold at sheriff's sale by the then sheriff; and as the two-thirds of the recognizance had been satisfied before that on the record, the sheriff improperly applied all the proceeds of the sale to the judgments. Afterward the lands of the surety in the recognizances were sold on a judgment in the same court against him by a later sheriff, who brought so much of the money arising from the sale of them as was applicable to the widow's one-third of the recognizance into the Superior Court under the statute for reinvestment for the benefit of the parties concerned, which was done by a loan of it to a party who has recently died, and whose administrator repaid the same into court at this term; and on application for that purpose the court applied it to the oldest outstanding judgment against the surety in the recognizance on the ground that it had been misapplied by the late sheriff, as the recognizance had been satisfied by the return of the preceding sheriff of the sale of the lands of the principal in it, and by which the lands of the surety had been discharged from the lien of it.

THIS was an *ex parte* proceeding on the petition of Charles H. B. Day, trustee of Martha J. Allee, in which he stated that one John W. Downs, with James F. Allee, entered into a recognizance in the Orphans' Court of Kent County, on the 3d day of April, 1868, for the real debt of three hundred and sixty-four

dollars and thirty-four cents, two-thirds thereof being payable to the parties entitled to it with interest thereon at the expiration of one year from the date of it, which was the day and year aforesaid, and the interest on the other one-third thereof to be paid annually to Elizabeth A. Hall, widow of William Hall, deceased, during her life, and the principal of it to be paid to the parties entitled to it at her death. Subsequent to the date of the recognizance, that is to say, on the 29th day of March, 1871, the legislature passed the act, *Rec Code* 681, 682, which provides for the payment into the Superior Court for the county of money arising from sheriff sales of real estates subject to the lien of any such recognizance in order that the same may be reinvested by the court for the like security and benefit of the same parties. Also subsequent to the date of the said recognizance two judgments were obtained by confession in this court against the said John W. Downs, one of them by William Virden for the real debt of nine hundred dollars, and the other by the First National Bank of Dover for the real debt of eighteen hundred dollars, besides interest and costs on each of them. The first-named was confessed on the 24th day of September, 1870, and the second on the 27th day of the same month and year. On the first, an execution was issued returnable to April term, 1871, and which was returned at that term, levied on the lands of the said John W. Downs, in Kent County, whose residence was in the State of Maryland and who had no personal property in this State. A writ of *venditioni exponas* was thereupon issued returnable at the October term, 1871, and delivered to Samuel Hargadine, then sheriff of the county, who thereupon sold the lands of the said John W. Downs so levied on for one thousand two hundred and fifty-five dollars, a sum much exceeding the amount of the said recognizance.

At the time of the said sale the two-thirds part of the said recognizance, payable at the expiration of one year from the date of it, had been paid and satisfaction had been entered on the docket, but the other third part thereof, upon which the interest was payable to the said widow during her life, had not been paid and was the first lien on the lands of the said John W.

Downs. The said sheriff applied the money arising from the said sale to the said judgments of *Virden v. Downs* and *The First National Bank of Dover v. Downs*, both of which had become liens after the said recognizance had become a general lien on all the lands of the said Downs in the county. Afterward in the year 1876 the lands of the said James F. Allee, the surety in the said recognizance, were sold on execution process by Peter L. Cooper, then sheriff of the county, and finding the aforesaid one-third of the said recognizance against the said Downs, with said Allee as surety in it, was satisfied, as appeared by the record, he applied out of the proceeds of the said sale of Allee's lands the sum of one hundred and twenty-one dollars and forty-five cents principal debt, besides interest then due and unpaid upon it, to the said recognizance, and at the October term, 1876, of this court, petitioned under the said act of the Legislature of the 29th day of March, 1871, to pay the said sum of one hundred and twenty-one dollars and forty-five cents into court, which was granted, and thereupon the same was paid into court by him, and on the same day the said sum was loaned by the court under the said act to Samuel C. Leatherbery, on a petition presented by him to the court for the loan of it, who has since died, however, and at the present term James L. Smith, administrator *c. t. a.* of the said Samuel C. Letherbery, deceased, has filed his petition to pay the said money into this court, the prayer of which has been granted, and the same has been paid into court by him.

The said money being thus again brought into this court, the petitioner, Charles H. B. Day, trustee of Mrs. Martha J. Allee, who had become the holder of a judgment at the suit of the Farmers' Bank of the State of Delaware against the said James F. Allee, by assignment, all the judgments of a prior date against him having been paid, that of the Farmers' Bank against him just before mentioned, being now held by the petitioner, Charles H. B. Day, as the trustee of the said Martha J. Allee, the petition prayed that as such trustee he might be allowed to take said money out of court, inasmuch as it had been clearly misapplied by the said Peter L. Cooper, then sheriff of the county, to the said recognizance, because the same had thereto-

fore been satisfied, and the lands of the said surety, James F. Allee, had been discharged from the lien thereof by the sale of the lands of the said John W. Downs, the principal in it, in the year 1871, by the said Samuel Hargadine, then sheriff of the county, notwithstanding nothing in fact had been paid on the said one-third part of it on which the interest was payable to the said Eliza A. Hall, widow of William Hall, deceased, during her life, and the principal to the parties entitled to it at her death, the whole of the money arising from the sale of the lands of the said Downs having been improperly and illegally applied by the said Samuel Hargadine, then sheriff, to junior liens.

Day, for himself as trustee, in support of his petition and his right as trustee to have the said money now paid to him by the court on the grounds set forth in it, cited *The State for the use of Vickary v. Vickary*, 1 Har. 193; *Ex parte Dixon's Executor*, 1 Del. Chan. Rep. 261; *Farmer's Bank v. Wallace*, 3 Harr. 371.

The Court ordered the same to be paid to him as such trustee.

WILLIAM E. WOOD & CO. v. THE WILMINGTON CONFERENCE ACADEMY.

After argument on a general demurrer in the trial of a *scire facias* under the mechanics' lien law, the court refused the application of the plaintiff for continuance of the case with leave to amend so as to substitute an action of *assumpsit* at common law in lieu of the *scire facias* under the statute in the case, and gave judgment for the defendant on the demurrer.

SCIRE FACIAS on claim filed under the mechanics' lien law, Rev. Code 668, on the 25th day of January, 1875, for supplying and putting in the academy of the defendant, incorporated under the foregoing name, a heating apparatus under an express contract between the parties. There were sundry pleas entered, to which the plaintiffs had demurred both generally and specially,

and after the argument had proceeded upon them and the counsel for the defendant had closed his reply, but before the court had announced any opinion upon the question presented in it, which was whether the plaintiffs had filed their claim within the proper time limited therefor by the statute, the counsel for the plaintiffs asked leave to withdraw the demurrers and for a continuance of the case with leave to amend by substituting an action of *assumpsit* at common law in lieu of the present action or proceeding by *scire facias* under the statute for the amount of the claim which they alleged was justly due to the plaintiffs and amounted to a large sum of money, on paying the costs up to that time, and cited 5 *Harr.* 390.

The counsel for the defendant said that as this action was by *scire facias* under the statute to obtain a judgment for the amount of the claim with a specific lien on the academy instituted on the 25th day of January, 1875, and a sufficient time had since elapsed to bar by limitation an action of *assumpsit* upon it, or any other action that could now be instituted upon it, and as the sole object of the application was thus to escape the bar of the statute of limitations, he would most earnestly object to it. The motion was reargued at the next term and is embraced in this report.

Massey, for the plaintiffs: It was within the judicial discretion of the court to grant the leave to amend if they saw proper to do it. *Rev. Code* 691, *secs.* 11, 15. It was simply to change the form and not the cause of action by a special count in *assumpsit* at common law on the identical claim and account already on file in the court under the mechanics' lien statute. The authorities in support of such an amendment were abundant both in this country and in England. Such an amendment in the form of the action merely from *assumpsit* to debt was allowed in 6 *Taunt.* 419; 1 *E. C. L. Rep.* 433; 1 *Crompt. & Mees.* 772; *Ibid.* 111; 2 *Crompt. & Mees.* 684; 1 *M. & W.* 316. In this case the amendment was refused, but it sustains the preceding case, and the principle was likewise ruled in 10 *M. & W.* 476; *Ibid.* 174; 13 *M. & W.* 556; 15 *M. & W.* 558; and in this country in 31 *N. J.* 229; 39 *Verm.* 198; 6 *Wend.* 506; 10 *Wis.* 81; 1

Wend. 93. It might, however, be objected on the other side that this application was to change the form of the action from *scire facias* to an action of *assumpsit*, but not only was this authorized by the express words of our statute, but it had been so directly ruled under a similar mechanics' lien law in the State of Mississippi. 54 *Miss.* 251; 43 *Miss.* 189. While the general principle for which he was contending had been adopted by our own courts in *Waples and Wife v. McIlvain's Admin.*, 5 *Harr.* 381; *Ennis v. Ennis*, 5 *Harr.* 390; *Clark v. Pritchett*, 5 *Harr.* 283; 1 *Houst.* 336; 4 *Houst.* 100; 3 *Otto* 163; and in 1 *Harr. & Johns.* 296, the change of the form of action from *assumpsit* to *trover* was permitted and from *assumpsit* to *covenant* in one count in the declaration, and to *debt* in another, were allowed in a case in Connecticut, the general statute of that State authorizing amendments in the form of actions, the cause of action remaining the same in that case. 39 *Conn.* 355. To the like effect was 7 *Allen*, 202; 6 *Gray* 323; 30 *Ala.* 640; 3 *Sum.* 379; 124 *Mass.* 240; 3 *Metc.* 273; 23 *Pa.* 327; 45 *Pa.* 403. But he would admit that if he proposed to change the cause of the action as well as the form of it, the amendment asked for could not be granted. 24 *Conn.* 27; 62 *Pa.* 301; 3 *Harr.* 75. Our constitution provides for amendments in pleadings, and this application was within the scope and design of its provisions. *Cons.*, art. 6, sec. 16.

The record of the suit showed that it was commenced by *scire facias* under the mechanics' lien statute on the 25th day of January, 1875, and that the work of making and putting the heaters in the academy, which constituted the cause of action, was finished on the 29th day of December, 1874, or thirty-five days before the commencement of the suit, and which would also show that so far as time itself was concerned a sufficient period had elapsed to bar it under the statute of limitations before the defendant's pleas had been filed in the case, for the record would show that they were not filed until October, 1878. They had filed an affidavit of defense at the first term, but it was known they needed indulgence and it was extended from term to term with the hope that it would be settled without a trial, but that hope had not been realized, and he admitted that he had

made a mistake in commencing it too soon under the special provision of the statute applicable to such a case; but even under a provision of that statute he then had the option to sue in *assumpsit* at common law, and it neither indicates nor establishes the slightest preference for its own remedy over it, and where can there now be any well-founded objection to the proposed amendment except the bar of the statute of limitations, under the cover of which the defendant alone seeks shelter and immunity from the justice of this claim in another and a proper form of action? Such a consideration when standing alone, as in a case like this, has often constituted ground for the court to grant such an amendment.

Day, for the defendant: The cause of action is the right to sue; *Bouv. Law Dict.* 211. And no amendment can be allowed which creates a new cause of action or changes the proof. 49 *Maine* 527; 39 *Wis.* 62; 2 *Root* 198. The plaintiffs had a good cause of action under the mechanics' lien law but brought their action too soon, and that could not be changed by an amendment, 19 *Geo.* 313, and no amendment will be allowed by a new cause of action which is barred by the statute of limitations. 23 *Wis.* 196; 10 *Tex.* 74; 4 *Yates* 507; 6 *S. & R.* 293; 27 *Mich.* 138. And an action commenced under one statute cannot be continued and prosecuted under another. 32 *Md.* 317; 12 *Wis.* 378. The plaintiffs having made their election to sue under the mechanics' lien law, could not afterward convert it into an action at common law. 57 *Barb.* 164. It cannot be done under the statute of jeofails. *Rev. Code* 691, *sec.* 15; 51 *Ill.* 422; 13 *Miss.* 473; 7 *Gray* 429; 18 *La.* 20; 1 *Or.* 169; 35 *Pa.* 423; 119 *Mass.* 459; 7 *Rep.* 685.

E. Saulbury, on the same side, referred to the provisions of the constitution and of the statute in relation to amendments in pleadings, and said that as long as they had been in force no amendment had been allowed in our courts to change the form of action in any case. In Rhode Island the court has refused to allow an amendment to change the form of an action from trover to trespass, 2 *R. I.* 540, and the same had been done in

the State of Wisconsin. 39 *Wis.* 62. Could the court amend the writ in such a case as this except in a matter of clerical error merely? It was issued against the express command of the statute that it should not be issued in less than sixty days or in more than ninety days after the completion of the work, and it was consequently absolutely null and void *ab initio*, and there was nothing to amend by. 4 *Cow.* 504. In New Jersey it has been held that the form of action under a particular statute could not be changed by amendment to another form of action either under a different statute or at common law, and yet the general statute for the amendment of pleadings in that State was much broader than ours. 31 *N. J. L. Rep.* 229. But before there could be any amendment there must be something to amend by. 1 *Tidd.* 161. In admiralty an action *rem* will not be changed by amendment into an action *in personam*, although courts of admiralty are as liberal in allowing amendments as courts of common law. *Brightly's Digest*, page 21, par. 387. The English cases cited on the other side go back to the time when the plea of the statute of limitations was regarded with disfavor and discouragement, but in not one of them did the amendment allowed involve such a radical reconstruction of the whole case from the beginning as would be seen in this case should the proposed amendment prevail. An action *in rem* cannot be changed to an action *in personam* by any amendment. 57 *Barb.* 164.

Ridgely, for the plaintiffs: The provision in regard to amendments in civil pleadings and proceedings was incorporated in the constitution to restrict and prevent even the legislature from taking away that power from the courts, and the provisions of the statute of this State on the same subject were as liberal as those of any other State in the Union. But to show that the legislature did not intend to give to the statute under which this suit was clearly cognizable, but by a mere mistake was instituted prematurely, any such exclusive effect and operation as the counsel on the other side seemed disposed to arrogate and claim for it, he had only to call their attention to the express words of it, which provide that nothing contained in it shall be

held to abridge or impair the right to sue in any other form of action applicable to the claim or demand, or to resort to any concurrent remedy provided by law for the recovery of it.

One of their chief objections to the motion was that there was nothing in the case to amend by, but in the case of *Ennis v Ennis*, 5 Harr. 390, cited by them, the very thing was done by this court which they have so confidently affirmed cannot be done by it, and which has been done over and over again, as the court will doubtless remember. But what is the office or the object of the original writ in any suit or form of action? The sole object of it is to bring the defendant in it into court to appear there to the cause of action of the plaintiff in order that it may be tried, and the service of which on the defendant is the first essential and indispensable step in the proceeding to give the court jurisdiction of it and the parties, but when he appears to it in court, as the defendant had long since done in this case, it is then to all intents and purposes practically *functus officio*, and of no further importance whatever in the prosecution of the suit. But if their doctrine were correct, what would become of the multitude of judgments that were annually entered in this court *dibitum sine breve*, or in a suit where the defendant appears gratis or voluntarily without writ? The English cases cited by his colleague were not old cases but cases decided since the passage of Lord Tenterden's act, and the principle ruled in them was that in that country they will always allow the amendment when it makes no change in the cause of action to prevent the bar of the statute of limitations in case the plaintiff without it would be obliged to bring a new action. In the case cited on the other side from 57 Barb. 164, which was under the mechanics' lien statute of New York, the action had proceeded to a judgment, which was, of course, *in rem*, and the amendment asked for was to change that judgment into a general judgment *in personam*, which was refused, whilst in the mechanics' lien case cited from 43 Miss. 189, it was expressly held that where it made no change in the cause of action the amendment would be allowed. The cause of action is the debt or demand which the plaintiff is seeking to recover in the action, whatever the form of it may be, 39 Verm. 202. But in every case cited on the other side the amend-

ment applied for was for nothing less than a change of the cause of action itself. This claim or cause of action was not barred by the statute of limitations when this suit was commenced, and is not yet barred by it so long as it is pending and this motion remains undecided, for if decided in our favor we proceed with the same cause of action and the same suit substantially with which we commenced, the form of the action merely having been in the meantime changed, and could anything more conclusively show that the utmost we propose is, after all, but a mere matter of form and not of substance?

The Court refused the motion to amend and gave judgment for the defendant on the demurrer, relying very much on the ruling of this court in the case of *The State use of Godwin v. Collins et al.*, 1 *Harr.* 216, and the policy and practice announced in it of allowing amendments after issue joint in law or fact before argument almost as a matter of course in fair cases when the rights of the adverse party would not be prejudiced by it, but not after argument and particularly on general demurrer.

JOHN R. WILSON, Agent, v. FRANK H. GREENWOOD.

In exceptions to a judgment by default, it will be sufficient if the summons alone shows that a specified hour was fixed in it for the appearance of the defendant, and that the judgment was rendered at that hour. The entry "October 27th, Dfdt. not appearing, and now to wit, after hearing the allegation and proof, judgment is hereby given by default," etc., is also sufficient.

CERTIORARI. The judgment was by default, and the exceptions to it were that the record did not show that there was any hour fixed in the summons for the appearance of the defendant; that it did not show that any default was made or that the judgment was rendered at any particular hour; and that it did not show that the justice heard the allegations and proofs of the plaintiff. But it appeared by the certified copy of the summons returned that a specified hour was fixed in it for the appearance

of the defendant, and the certified copy of the docket entries also showed the following: "October 27th, Dfdt. not appearing, and now to wit, after hearing the allegation and proof, judgment is hereby given by default," etc.

The Court affirmed the judgment, holding the record to be sufficient in all respects excepted to.

THEOPHILUS T. DERINGER'S administrator *v.* BRONOUGH M.
DERINGER'S administrator.

On the filing of a plea of set-off of one thousand dollars for so much money had and received by the plaintiff to and for the use of the defendant, drawn at full length according to the form prescribed for such a plea, the counsel for the plaintiff gave notice to the counsel for the defendant to state the matters of set-off referred to in it with greater certainty, which was not done, and he therefore declined to reply to the plea and at the term the court upon his application ordered it to be done.

NARR *in assumpsit* with a plea of set-off of one thousand dollars for so much money had and received by the said Theophilus T. Deringer in his lifetime, to and for the use of the said Bronough M. Deringer in his lifetime, drawn in full and according to the regular form of such a special plea of set-off when set out at length, upon the filing of which the counsel for the plaintiff had given notice to the counsel for the defendant to state the matters of set-off referred to in the plea with reasonable certainty under the thirty-third rule of this court, and had declined to reply to it until that requirement should be complied with.

Higgins (*Spruance* with him), for the plaintiff, now moved at this term for an order on the court on the counsel for the defendant to state and set forth the matters of set-off referred to in the plea with greater certainty and particularity.

G. B. Rodney, for the defendant, objected that the matter having been originally pleaded by the regular rule day in a

plea of set-off drawn at full length and in strict accordance with the complete form prescribed in the precedents for such a plea, he could not be required to go further and set forth the matter of defense so pleaded with any greater amplification or particularity.

The Court, however, ordered that the matter of set-off pleaded should be stated with more certainty and more in detail, as perhaps the money referred to might have been received in several amounts at various times and from several persons to and for the use alleged in it, in which case it might be important to the plaintiff to have both the several amounts and the several persons from whom they were received specified by the defendant before replying to such a plea. It might also have reference to and depend upon a mutual account of money transactions between the two decedents in their lifetime, and which still remain open and unsettled between their legal representatives.

GEORGE H. HOLLIS v. ISAAC W. VANDERGRIFT.

If in an action on a promissory note a duly certified copy of it be filed with the declaration of the plaintiff, and the defendant does not file an affidavit at the time of pleading to it denying his signature to the original note of which it purports to be a sworn and correct and literal copy, he will not be thereby concluded from proving on the trial that it had been materially altered since he signed it without his knowledge and consent.

An action of *assumpsit* will lie against one of several makers of a promissory note, although it is not made joint and several in its terms. And in such an action on such a promissory note a material alteration made in it at the instance of the maker sued on it before he signed it, or made afterward and approved by him, will not vitiate or avoid it as to him, nor in the latter case will the execution of a judgment bond by all the makers of the note after the maturity of it for the amount of it, and not accepted by the payee of it, constitute such an approval by the defendant, unless it is proved that he knew of the alteration when he executed the bond.

What was said to the payee and plaintiff in such an action about the note by another maker of it, and who was the first and principal one of them, when he delivered it to him, in the absence of the defendant, is not admissible in evidence.

An attorney-at-law residing in Maryland, who was of counsel for the plaintiff, who also resided in that State when the promissory note was given, but was not and never had been of counsel for him in the case before the court, admitted as a witness for him to prove a matter the knowledge of which he had acquired independently of any communication with or information from the plaintiff.

The doctrine of the law as to the presumptions of fact which arise in relation to alleged material alterations in written instruments when unexplained by direct and positive evidence, as recognized and ruled in this court in the case of *Welch v. Coulborn*, 3 *Houst.* 647, affirmed.

ACTION of *assumpsit* on two promissory notes for one thousand dollars each, made on the 1st day of January, 1877, one at twelve and the other at fourteen months, by John A. Vandergrift, Isaac W. Vandergrift, and Leonard G. Vandergrift to the order of George H. Hollis, the plaintiff. There were several credits indorsed on the back of the note first referred to. Heard before Comegys, C. J., and Wootten, J.

They were proved and read in evidence when the counsel for the plaintiff rested their case.

Lore, for the defendant, moved a nonsuit because in both of the counts in the declaration the notes were declared on as joint and several, but soon afterward withdrew the motion, and stated that the defense would be that two material alterations had been made in the notes after they were signed by all three of the makers of them without their knowledge and consent, by the interpolation of the words "or order," and the erasure of the words "& Co." immediately following the name and signature of John A. Vandergrift, the first and principal maker of them when they were left with him by the other makers.

Frank Vandergrift, a youthful brother of the first and son of the third maker of them, was the subscribing witness to them, and was now called as such to the stand to prove the alleged alterations in them.

Higgins (*Moore* with him), for the plaintiff, objected to the admissibility of the proposed evidence. pursuant to the provisions of the statute, *Rev. Code* 674, *sec.* 5, correct copies of the notes were duly filed with the declaration of the plaintiff in the prothonotary's office, and no affidavit denying their sig-

natures to the original notes of which they purported to be and were sworn and correct and literal copies having been filed by the defendant at the time of pleading to it, he was thereby concluded and estopped from denying and proving in the trial of the action that he and the other makers of them signed those very notes now before the court and jury; for that is what his proposed denial now amounts to—nothing more nor less.

Lore: Such a construction of the statutory provision cited on the other side could not be in accordance with the literal import of its terms or the true meaning and intention of it; and as it was in derogation of the common law and of the rights of a defendant in such a case under it, the court should and doubtless would construe it strictly. It had been generally if not universally understood by the members of the bar to be confined to cases where the names of the maker or makers had never in fact been signed to the paper.

The Court overruled the objection and admitted the evidence.

The witness was then examined and stated that he signed the notes as the witness to them, and saw the makers sign them before he did so, and he then saw the words "& Co." were in them, next to the name of J. A. Vandergrift, which was the first name signed to them, but the words "or order" were not then in them. With this testimony the counsel for the defendant rested his case.

Peter W. Vincent was then sworn as a witness on the other side, and in reply to a question was proceeding to state that he was present when the notes were delivered to Hollis, the plaintiff, by John A. Vandergrift in Christfield, Maryland, and what was said by him in regard to the notes at that time, when Mr. Lore asked him if Isaac W. Vandergrift, the defendant, was present on that occasion, and being answered that he was not, objected to his stating anything that was said by John A. Vandergrift about the notes at that time.

The counsel for the plaintiff replied to the objection that it had already appeared in the evidence for the defendant—what

the court, however, would have presumed without it under the circumstances—that he was then acting as the actually accredited and appointed agent of the defendant and the other makers of the notes to deliver them to the plaintiff at the place mentioned where they both resided, and therefore anything he said to the plaintiff about the notes when he delivered them to him, although in the absence of the defendant, would be admissible in evidence against him. 2 *Whart. on Ev.*, sec. 1212; 1 *Greenl. Ev.*, sec. 180; 1 *Harr.* 23, 234.

The Court sustained the objection and excluded any such evidence.

The witness then proceeded and stated that he saw the notes on that occasion and they were just as they now appeared when they were delivered to Hollis at that time, and he remembered distinctly that Hollis then asked Vandergrift why the words "& Co." had been scratched off of them.

Thomas S. Hodgson, Esq., an attorney-at-law, residing in Maryland, was also called as a witness on behalf of the plaintiff, but when he stated that he was counsel for the plaintiff with reference to the notes when they were given, but was not his counsel in this case, in answer to a question from Mr. Lore, he objected to his competency as a witness in this case upon that ground.

Moore: The witness was not of counsel for the plaintiff in that suit, and never had been, nor did they propose to prove by him anything which had been communicated to him by or which he had learnt from the plaintiff, but a matter of fact which he knew entirely independent of any knowledge or information received from him. 4 *Houst.* 286, 305; 1 *Greenl. Ev.*, sec. 239.

The Court overruled the objection and admitted the witness.

He was then sworn and stated that he was acquainted with the handwriting of John A. Vandergrift and that the words "or

order" interlined in the notes were in his handwriting, and which was followed with the testimony of other witnesses to the same effect.

It was also proved that after the notes had matured, not being prepared to pay them, the makers all executed two joint and several judgment bonds for the real debt due on them respectively to the plaintiff, but on account of an informality in them he declined to accept them and afterward returned them to them.

The counsel for the defendant asked the court to charge the jury that as these were in express terms joint promissory notes only, and not joint and severally made by three joint makers, neither this, nor any other action would lie against any one of them severally upon such promissory notes.

The counsel on the other side, in reply to it, cited the provision of the statute which makes all contracts in writing joint and several. *Rev. Code* 357; 2 *Ch. Pl.* 116. They also cited on the doctrine of legal presumption in case of unexplained alterations appearing in written instruments 3 *Houst.* 647; 1 *Greenl. Ev. sec.* 564; *Walters v. Short*, 5 *Gilm.* 252.

The Court, Comegys, C. J., charged the jury: That the action would lie upon the two promissory notes in question severally against the defendant as one of the three alleged joint makers of them under the provision of the statute referred to, although they appeared in terms to be their joint promissory notes only, and unless some other defense had been proved in the case to the satisfaction of the jury, their verdict should be in favor of the plaintiff. As to the alleged alterations in the notes, it having been clearly proved in the case that the words "& Co." were expressly objected to by the defendant and were erased from them for that reason before they were signed by him and Leonard G. Vandergrift, and that John A. Vandergrift knew and approved of it before he delivered them to the plaintiff, it could not and should not have any effect under such circumstances, to invalidate the notes or to defeat the right of the plaintiff to recover upon them in the action. But if the other alteration, the words "or order" interlined in them, which the court considered

a material alteration, as it made the notes negotiable, which they were not without them, and thereby changed the character of them in a very material respect, were inserted in them by John A. Vandergrift or by any other person after they had been signed by the defendant and it was done without his knowledge and consent, it would vitiate and avoid the notes as to him, and the plaintiff could not recover on them against him, unless it had been proved to the satisfaction of the jury that the alteration referred to had so been made in them and that he approved of it; but his subsequent execution with the other two makers of the two judgment bonds for the amounts of them respectively after their maturity could not have that effect or constitute a recognition or approval of the alteration on his part, unless the jury were satisfied from the evidence that he knew when he executed the judgment bonds that such alteration had been made in them, and which were then in the possession of the plaintiff. The doctrine of law as to the presumptions of facts which arise in relation to alleged material alterations in written instruments, when unexplained by direct and positive evidence recognized and ruled in this court, he stated and read from the charge to the jury in the case of *Welch v. Coulborn*, 3 *Houst.* 647.

The jury retired, and after being out a long time without being able to agree upon a verdict, were discharged by the court.

MARSHALL TWEED v. NATHAN H. DAYETT.

Only such instruments of writing for the payment of money as are for the payment of money simply and for nothing more are included in the statute which provides for the recovery of judgment at the first term, on copy of the cause of action filed by the plaintiff with his affidavit that he believes it to be justly and truly due, without an affidavit by the defendant that he has a legal defense to the same or a part thereof, etc.

THE affidavit of the cause of action was as follows: Marshall Tweed, the plaintiff above named, being duly sworn, doth say

that Nathan H. Dayett, the defendant aforesaid, is indebted to him on account of a certain article of agreement or lease for a balance of the rent annually reserved by the said lease, the said lease being for five hundred dollars, which is the cause of action in this suit, a copy of which is hereto attached; that the sum demanded by the plaintiff from the defendant is one hundred and eighty-one dollars with interest thereon from the 25th day of March, 1877, and that he verily believes the same is justly and truly due.

This was followed by his signature and the jurat of the prothonotary, and these by a copy of the article of agreement referred to in the affidavit as follows: Made this day between Marshall Tweed and Nathan H. Dayett, to certify that Marshall Tweed doth lease the grist mill and saw mill to Nathan H. Dayett for the term of one year, commencing on the 25th day of March, 1876, and ending on the 25th day of March, 1877, for the sum of five hundred dollars, to be paid semi-annually, one-half—two hundred and fifty dollars—on the 25th day of September, 1876, and two hundred and fifty dollars on the 25th day of March, 1877. The said Dayett agrees to do all of Marshal Tweed's sawing for fifty cents per hundred, and is to be at all expense of five dollars and under for repairs, and Tweed is to be at all expense over five dollars. The said Dayett is to attend to the waste-gates. Tweed agrees to pasture one cow at fifty cents per week. The said Dayett is to have ground to plant one bushel of potatoes. Tweed reserves the right of the water in case of there not being enough of water to run both mills, and agrees to deduct for that time and pay Dayett one dollar a day for that time. Signed and sealed the 24th of March, 1876, by the parties respectively.

J. H. Rodney, for the plaintiff, now moved for judgment for want of an affidavit of defense.

Higgins, for the defendant: In such a case no affidavit of defense was necessary to prevent judgment going for the plaintiff, because such a claim or cause of action was not within the purview of the statute.

The Court: The articles of agreement not only contain a covenant to pay a certain money rent, but also sundry mutual covenants between the parties, the breach of which by either of them would sound only in unliquidated damages, and there are some on both sides which are not in terms for the payment of money, but for the performance of certain acts; we have always considered, however, that the statute referred to was only intended to apply to such instruments of writing for the payment of money, or are for the payment of money simply, and for nothing more. The plaintiff was therefore refused judgment.

THEOPHILUS T. DERINGER'S administrator *v.* BRONOUGH M.
DERINGER'S administrator.

The making of a probate against the estate of a deceased person by the treasurer of an incorporated company appointed administrator of the deceased creditor in another State under an act of incorporation chartering it for such purposes is not warranted by the provisions of our statute in regard to probates.

THIS was an action of *assumpsit* on due bills, promissory notes, and other written promises to pay money, numbering twelve in all, made in the years 1854, 1855, 1856, 1857, and 1861, by the decedent of the defendant to the decedent of the plaintiff, and was commenced on the 14th day of October, 1874, with the usual pleas and *plene administravit*, and no assets beyond one thousand dollars which is admitted to be due to the plaintiff. The counsel for the plaintiff, after proving partial payments and admissions of a continued indebtedness on these several demands made by the former to the latter decedent within six years prior to the commencement of the action to take it out of the operation of the statute of limitations, which was one of the pleas in the case, produced and tendered to the court the probate of the plaintiff's demand to the amount of eight thousand nine hundred and twenty-eight dollars and fifty-one cents, made by The Fidelity Safe Deposit and Trust Com-

pany of the State of Pennsylvania, administrator of Theophilus T. Deringer, deceased, and which was executed by the treasurer of the company.

G. B. Rodney, for the defendant, objected to it because probates against the estates of deceased persons are provided for and prescribed by our statute, and are absolutely required by it for the protection of such estates against unjust and illegal demands, and our courts have always held that it must be properly complied with according to the true intent and meaning of it. For a "debt due to a corporation," it very properly provides that the probate shall be made by the cashier or treasurer of it; this, however, was not a debt due to this corporation within the obvious meaning and intention of the statute, and for the justice of which it requires the solemn oath or affirmation of such an officer of the corporation to be taken when it is due to such corporation in its own inherent right, but if due to any one it was due to Theophilus T. Deringer in his lifetime, and to his estate, as we express it, which is the same thing, now that he is dead.

Higgins (*Spruance* with him) replied that it had been decided by the highest court in the State that this corporation is competent to maintain this action in this court as the administrator of Theophilus T. Deringer, deceased, duly appointed in the State of Pennsylvania under its act of incorporation in that State, and this being a debt due to it as such, the probate could be and had been probably made by it in such a case.

The Court, *Comegys*, C. J., dissenting, sustained the objection and rejected the probate for that reason and as unwarranted by the statute. Notwithstanding the ruling, however, the counsel for the plaintiff proceeded to the jury and requesting the court to instruct them to that effect, which they did, they returned a verdict for the defendant, on which the counsel for the plaintiff gave notice that they would tender a bill of exceptions to the charge of the court.

DANIEL MAGARITY *v.* THE MAYOR AND COUNCIL OF WILMINGTON.

The city of Wilmington, as a municipal corporation, is not liable for consequential damages in flooding cellars by raising the grade of a street.

A municipal corporation is not liable for damages resulting from an act done or authorized by it in the due exercise of a discretion conferred upon it by law.

The functions of such a corporation are of two kinds, judicial and ministerial.

Under the former are classed all those powers which are discretionary merely, such as those exercised in this case, of building the sewer in Monroe Street and raising the grade of Maryland Avenue. To the extent of deciding upon the location, the size, the inlets and outlets of the sewer, and the height and grade of the bed of the avenue, the powers were purely judicial or mental determinations, subject, as all such are, to the natural infirmity of human judgment. For the existence of such infirmity no court anywhere has ever held a party liable, nor for the mere mistakes or errors that resulted from it. They have never treated them otherwise than as misfortunes merely, involving in no civil responsibility; and it is because of this consideration that such acts of a municipal body as are purely judicial or discretionary subject the corporation to no responsibility whatever, though they may result in great mischief or injury to individuals.

In the powers ministerial are embraced such acts of the municipal body through its officers or agents as are the expression or exercise of discretion in the matter of action, or things done in pursuance or in furtherance of the ends to be accomplished and determined upon by the discretion or judgment of the body politic. When in the use of powers ministerial or executory merely its course is a well-defined one, and it must follow it with due care, or submit to the legal consequences, for municipal corporations, though public bodies, are as subject to this rule of conduct as individuals are. Accordingly, the plan of grading Maryland Avenue and of constructing the sewer under Monroe Street, as matters to be decided by the municipal corporation, involved no sort of responsibility to private parties, but the carrying into effect the work contemplated by engineering agency, or by mechanical or manual labor, was not in any sense an exercise of a judicial, but of a ministerial power. When such a corporation acts in execution of a plan or design which it has determined on it loses its shield of judicial protection, and becomes as liable for faults or errors in its action, as individuals who are held to competent skill in the performance of any work they may lawfully undertake that may affect the rights of others.

The law in such actions as this takes no account, nor allows a jury to do so, of any conjectural or speculative damages merely, or of any damage which is not the natural and proximate result of the act done, and which is not reduced by proof to an actual money estimate.

THIS was an action on the case brought by Daniel Magarity, who was the owner and occupant of a house in the city of Wilmington, against the municipal corporation of it, for consequential damages resulting to him from the flooding of the cellar and the surrounding premises of it with water, in consequence of changes made in the grading and draining of the public streets in the vicinity, made since the erection of it by the order and direction of the city corporation, and which he alleged had been so improperly, inadequately, and insufficiently planned and constructed as to occasion the injury complained of by him.

The evidence in the case showed that his property in question had been very seriously injured and damaged by being flooded with water since the changes had been made in the grade and sewers of the streets referred to, and the main if not the only question involved in the case was whether the city was liable for it.

Lore, for the plaintiff: As the duty and obligation of providing drainage or sewerage of surface water in the streets of the city was judicial, or at least *quasi* judicial in its character, requiring the exercise of judgment in devising and executing the best and most efficient plan and method of doing it, the legal principle very properly follows that the corporation is not liable to a civil action for wholly failing to provide it when necessary, nor perhaps for any defect or want of efficiency in the plan of it when adopted, or for the insufficient size of the gutters or sewers for the purposes intended, particularly if the adjoining property in question should be left in no worse condition than if no gutters or sewers whatever had been constructed. But when the duty in that respect ceases to be judicial and becomes ministerial in its character, although there be no statute on the subject, a municipal corporation is liable in a civil action to any owner of such property in the city for the negligent discharge or for the negligent omission to discharge such duty for any such injury resulting therefrom to such owner. Therefore, in accordance with the distinction in this respect between the judicial and ministerial duties on the part of the corporation (a distinction plain in theory, but oftentimes of difficult application

in particular cases) a municipal corporation is liable in a civil action for negligence in the ministerial duty and obligation of keeping in order and repair, which it alone has the power and authority to do, of the public sewers of the city, as respects the property of such an owner as is connected therewith by his own private drains, in consequence of which he has sustained an injury to his property which could have been avoided and prevented had such public sewers been kept in proper order and condition and sufficient to vent all the water emptying into them at all times, or to prevent obstructions from forming in them so as to dam and hold back the water in the cellars and drains of such property. The work of constructing, repairing, and cleansing and keeping in good and sufficient order and condition all public sewers, gutters, and drains in the city is a ministerial duty and function imposed by the charter on the municipal corporation of the city, and it is responsible in a civil action on the case at the suit of any owner of such property in the city for any injury or damages resulting from the negligence with which they have performed the work. 2 *Dillon on Mun. Corp.*, secs. 801, 802; *Clark v. The City of Wilmington*, 5 *Harr.* 243; *Miller v. The City of Brooklyn*, 5 *Am. Law Repr.* 33; *S. C.*, 32 *N. Y.* 489. If, however, the capacity of the public sewer in question in this case was not sufficient to vent the water flowing into it, the corporation would not be liable, provided the plaintiff's property was no worse after than before the sewer was constructed.

Macallester (*Bradford* with him), for the defendant, asked the court to charge the jury that any damage or loss the plaintiff may have sustained by reason of any and all overflows of water resulting from the leveling of Maryland Avenue at the junction of Monroe and Chestnut Streets (where the culvert was carried across said *avenue*) is *damnum absque injuria*, and the city is not responsible or liable therefor in this action. Also that any damage or loss the plaintiff may have sustained by reason of any and all overflows of water resulting from the insufficiency in the size of the inlets leading into the sewer in question is *damnum absque injuria*, and the city is not responsible or

iable therefor in this action. And further, that any damage or loss the plaintiff may have sustained by reason of any and all overflows of water resulting from the insufficiency in the size of the sewer in question (the Monroe Street culvert) is *damnum absque injuria*, and the city is not responsible or liable therefor in this action. *Rev. Code* 414, 415, 443; 5 *Harr.* 243; 35 *Pa.* 324; 69 *Pa.* 420; 9 *Watts* 382; 18 *Pa.* 187; 1 *Denio* 595; 32 *N. Y.* 489; 13 *Gray* 601; 4 *Allen* 41; 10 *Allen* 106; 29 *N. Y.* 459; 28 *Conn.* 50. That the city is not responsible or liable in this action for any damage or loss that the plaintiff may have sustained by reason of the drain connecting his cellar with the sewer in question, if said drain was placed there at his request or with his consent. That the plaintiff, in erecting his house before the establishment of the legal grade of Maryland Avenue, and before receiving the elevation of the curb line, built at his peril so far as loss or damage might result to him from the lawful improvement of the adjacent streets or the lawful construction of sewers; and that the plaintiff is not entitled to recover any damages in this action unless the jury are satisfied upon the evidence adduced before them that the Monroe Street culvert leaked, and that by reason of such leaking the plaintiff has sustained loss or damage and in that case he can recover only the amount of damage directly resulting from such leakage.

But if the court should decline to give to the jury the three instructions first above mentioned or any of them, the court is asked to give the next following instruction in lieu of the instructions or instruction they may decline to give as above, to wit: That if the jury believe that the plaintiff refused to allow the city authorities to raise his curb and sidewalk in order to protect his premises from overflows of surface water from the streets, and that in consequence of such refusal his curb and sidewalk were not raised, the plaintiff is estopped from claiming or recovering any damages or losses resulting to him from any and all overflows of surface water from the streets which would have been prevented by such raising of his curb and sidewalk. But if the plaintiff is entitled to recover any damages in this cause, he can recover only for losses sustained by him during the period of three years next preceding the bringing of this

action, to wit: from April 24th, 1875, to April 24th, 1878, and such losses must not be conjectural, but must have been proved in this action, and that no depreciation in the value of the plaintiff's premises, resulting from a liability to overflows of surface water from the streets by reason of the leveling and improvement of Maryland Avenue, can be considered by the jury in ascertaining the damages (if any) in this action.

Lore: If the jury were satisfied from the evidence in the case that the inlets into the sewer in question were originally constructed of insufficient dimensions to admit the flow of the water into it, then it was a ministerial act and a mistake committed in the construction of it, and if in consequence the injury and damage to the plaintiff became greater after than it had been before the raising of the grade and bed of Maryland Avenue, the plaintiff would be entitled to recover in the action for it.

The Court, Comegys, C. J., charged the jury: This is not a case of first impression in this State, although the principles that govern it have not been much understood by the public, or even by the profession. So far as anything appears by the report of the case of *Clark v. The City of Wilmington*, 5 Harr. 243, the Superior Court of this county in 1849 had no cases before them for their guidance, and yet they made a decision in the case in accordance with the best authorities elsewhere and consistent with the reason of the matter itself. I can say this properly, for neither my brother Houston nor myself were members of the court at that time. In one aspect in which this case has been presented to this court and jury, it is impossible to distinguish that case from the one before us. There the action was for damages by reason of flooding cellars by raising the grade of a street; here, one of the grievances for which the suit was brought is the same precisely. In both, the question is presented of the liability of the city of Wilmington, as a municipal corporation, for consequential damages arising from the exercise by the authorities of the city of a power conceded by the plaintiff to exist in it. In that case, the decision of the court was that the city was not liable for such damages, and if we had any doubt, not controlling, of the sound-

ness of the view taken by the court in the case, which we have not, we should still feel constrained to sustain it, it being safer always to abide by or follow a precedent established by our own courts, though a different one might fairly have been made, then to stray into the wide field of judicial decision in the hope of finding one established elsewhere which may seem more consonant with one's individual views.

The principle of the decision in *Clark v. The City of Wilmington*, as in that of the important cases cited and commented upon by the defendant's counsel, is this: that a municipal corporation is not liable for damages resulting from an act done or authorized by it in the due exercise of a discretion conferred upon it by law. The functions of such a corporation are of two kinds, judicial and ministerial. Under the former are classed all those powers which are discretionary merely, such as those exercised in this case, of building the sewer in Monroe Street and raising the grade of Maryland Avenue, formerly the Newport Turnpike. To the extent of deciding upon the site, the size, the inlets and outlets of this sewer, and the height and grade of the bed of the avenue, the powers were purely judicial or mental determinations, subject, as all such are, to the natural infirmity of human judgment. For the existence of such infirmity, no court anywhere has ever held a party liable, nor for the mere mistakes or errors that resulted from it. The absence or want of sufficient mind to decide right with respect to the affairs of this world at least has never been treated otherwise than as a misfortune purely, involving no civil responsibility. It is because of this consideration that such of the acts of a municipal body (and it is precisely such a body that we are now dealing with) as are purely judicial or discretionary, subject the corporation to no responsibility whatever, though they may result in great mischief or injury to individuals. When pursuing or exercising that function a municipal corporation is as free from all liability for consequences resulting from error of judgment as is this court or any other judicial tribunal acting within its sphere, when it makes mistakes—as the wisest courts sometimes do, to the serious detriment of individuals. When the right to exercise judgment exists, a party who does it honestly is answerable in no court for the conse-

quences that result from it. It would be a serious defect in the arrangement of human responsibility were it otherwise. Municipal bodies are bodies politic, within a larger body politic—the entire State. The discretionary powers granted them are simply part of such powers held by the whole and delegated to them. The agents or officers of those bodies (in this case the city council) are in their turn the recipients of divisions or parts of the same powers, and are to be treated with respect to the subject of responsibility as the corporation itself—no personal liability whatever attaching to them. Under the powers ministerial are embraced all such acts of the municipal body, through its officers or agents, as are the expression or exercise of discretion in the matter of action; that is, the things done in pursuance or in furtherance of the end to be accomplished by the discretion or judgment are ministerial. Now, there is a wide distinction between judicial or discretionary and ministerial acts, already referred to. No exercise of the human intellect, how perfect soever the training of the mental faculties may have been from the teachings of the best schools and the study of the best forms and methods of human reasoning, can make perfect the conclusions of the mind of any man. When he has done the best he can, with the best lights he can collect for the illumination of his mind, he is not responsible for error, and ought not to be. But when he is in the use of powers merely ministerial, that is, executory merely, his course is a perfectly well-defined one, and he must follow it with due care or submit to the legal consequences of not doing so. Municipal corporations, though public bodies, are as subject to this rule of conduct as individual persons are; there is no different law between them. Keeping these views in mind, you will, I think, gentlemen of the jury, find no legal impediment or stumbling-block in the way of your progress to the end of a just decision in this case.

There is no dispute about the fact that the powers of the corporation of the city of Wilmington are plenary for all that concerns the comfort, happiness, and security of the inhabitants as members of the local body politic. The legislature of this State has been applied to from time to time, and often by the authorities of the city, for new or better defined municipal or police

powers, and their application has always been favorably entertained; and for a long time past—years before any of the work, injury from which is complained of in this case, was done—the city had ample power over its streets both upon and under their surface to promote the interest of the whole people living within it. Accordingly, it could make and establish such grades as it chose, and construct and build sewers with their appliances for purposes of drainage and security of the public health. To decide to what extent these powers should be exercised was one of pure judgment or discretion, involving no accountability of any kind, except to the people of the municipality in the exercise of their power of election. Accordingly, the grading of the avenue in this case, and the construction of the sewer, as matters of decision by the city authorities involved no sort of responsibility to private parties; that is, the determination to grade and construct and the form of doing both was a plan of action entirely judicial; but the carrying into effect the work contemplated by engineering agency or by actual mechanical or manual labor was not in any sense a judicial proceeding but was ministerial. Now, when a public corporation, as a city, acts ministerially, or in the execution of a plan or design which it has determined on, it ceases to have the judicial shield of protection and becomes as liable for faults or errors of action as individuals are. The latter are held to competent skill in the performance of any work they may lawfully undertake that may affect the rights of others, and the former are in no better case. You are to treat this corporation, therefore, in the matter of any damage that you may believe from the testimony accrued to the plaintiff from any defect in the *work* of the city, just as you would a private individual but not more unfavorably. The city had a right to grade the street and build the sewer, and the plan of doing both was discretionary purely, involving no responsibility to a damaged party; but it was as much bound, but no more, to do its work well as an individual. Whether it was well done or not in this instance it is for you alone to judge from the proof in the cause, and not otherwise than by the proof. We call your attention to all the testimony which has been offered on both sides upon the subject of the construction of the

sewer—the alleged intrusion of the water, that should have gone down it, into the cellar of the plaintiff; the alleged holes in the sewer opposite the premises of the plaintiff, the description of the effect upon its floor by the rise and fall of water in the sewer, the testimony that these holes did not extend through the sewer wall, that the work was well and sufficiently done, and as sewers are commonly built; that the plaintiff declared to two of the defendant's witnesses that he made no complaint of the sewer, but of the overflowage of his premises by the avenue grade only, and the further fact that the plaintiff's building was erected upon a lot which was very low, marshy, and wet at times; and to all other matters proved, more within your own knowledge than ours, which tend to support the claim of the plaintiff to damage from the sewer and the defense of the city against it. This is the material and, in fact, only thing you are to consider upon the question of damage

We say you are to consider the defect in the construction of the sewer only as the subject-matter of damage to the plaintiff, if he has sustained any, in fact, from it. For we instruct you that no proof having been made that the city in raising the grade of and filling up Maryland Avenue acted in an unskillful, oppressive, or designedly injurious manner in any respect to the plaintiff, he has sustained no injury, no matter what the damage he has proved, that gives him a right of action against the city. Every man in a city holds his property subject to the right of the authorities having power for that purpose (as these authorities are conceded to have had) to regulate and fix the grade of the streets by elevating or lowering them according to their judgment or discretion of what will be best for the public interest. If after such regulation he is obliged to ascend into or descend from his property, which before was upon a level with the street, or to be subjected to the flowage upon his lot of surface water which before flowed over the street, he has no relief whatever against the city, to the street of which his own property becomes subject to what is known in the law in other cases as a servitude. In the charter of some cities or municipalities there is relief for this, but here there is none, and neither you nor we can afford any. You are therefore to lay out of

view entirely all the proof of the overflow of the plaintiff's premises from the grading of Maryland Avenue. You can give no damages on that account.

Should you believe, gentlemen, upon a calm, deliberate consideration of the testimony on both sides, that the sewer built by the defendant was in its structure deficient and not in accordance with the mode of building such works, and that the plaintiff has proved to you satisfactorily, by the evidence of his witnesses not successfully contradicted by the witnesses for the defendant, that he has sustained damage to his premises thereby you are still to be reminded that the question of the sufficiency of the sewer to vent the water directed from the surface into it or the size of its inlets is one not involved in this case, as being one of decretion in the city only, and also that you have no right to allow for any damage the amount of which has not been *proved* to you, nor any whatever accruing at any other time than between the 24th day of April, 1875, and the like day in 1878, or during the period of three years before bringing the suit in this case. This will necessarily exclude the damage by the settling of the walls and their cracking in 1872, or at any other time prior to the 24th day of April, 1875, or since the 24th of April, 1878. And you can allow for no damage proof of which by a money estimate has not been made. In these cases nothing is to be left to imagination or speculation, but everything is to be brought down to the straight and plain line of actual proof. All damages not proved by a money estimate are purely remote or speculative, and the jury has no right whatever to consider them, however it may comport with their notions of right to do so. The law in such actions as this takes no account, nor allows a jury to do so, of any damage which is not the natural and proximate result of the act done and which is not reduced by proof to dollars and cents.

COURT OF ERRORS AND APPEALS.

JUNE TERM.

1879.

JOHN MILLER, executor of TAMAR COOCH, deceased, complainant below, appellant, *v.* JOSEPH W. COOCH, administrator *cum testamento annexo* of WILLIAM COOCH, deceased, and others, defendants below, respondents.

The personal estate of a testator is the primary fund for the payment of his debts and legacies.

In the payment of legacies those of a specific nature are to be paid before general ones.

The real estate is not liable for the payment of either debts or legacies, unless the testator has unequivocally so declared in his will.

In this State all the property of a testator is subject to the payment of his debts, but the real is only to be resorted to for that purpose, even in the case of liens upon it, after the personal estate has been exhausted, which still preserves the rule that the personal estate is the primary fund for the payment of the testator's debts. Of course this is not to be understood as applying to liens which the creditor proceeds to enforce.

The bequest by a testator of all his personal estate has always been held, where there were no expressions in the will that required a different construction, to mean simply the balance of the personal estate that should be left after the payment of his debts and other legal charges, such as those of burial and of administration. And we know of no case in which those words alone had been held to cast the payment of the debts, expenses of administration and legacies upon the realty.

A legacy is only specific when it designates a particular thing or things by specific description, as my bay mare, my gold watch, or my shares of stock in bank, or the like, or mentions some place where the thing can be found, as my bank notes in a certain drawer, or indicates some part of the personal estate, consisting of various articles which can easily be distinguished and set apart from

the residue, as all of my personal property in a certain room, house, hundred, county, etc. But where it is of all merely, indicating no locality or more particular specification, it is general, the same as is imported by the words rest and residue.

But when the intention of the testator to create a new fund for the payment of his debts appears plain, that fund must first be resorted to if he has so expressed himself. But before that is taken as a fact, there must be no doubt left on the face of the will; it must plainly appear by it that the testator so meant. And this is not to be settled by conjecture or mere inference, but is to be shown by unequivocal language or expressions contained in the paper itself.

THIS was an appeal from the decree of the chancellor sitting in and for New Castle County, and was heard before Comegys, C. J., and Wootten, Houston, and Wales, Judges, at the last, and was held under advisement until this term of the court.

The case arose in the court below on a bill of complaint filed by the executor of Tamar Cooch, deceased, against the administrator *c. t. a.* of William Cooch, deceased, and the heirs-at-law of the devisees under the last will and testament of the said William Cooch, deceased, her husband, whom she survived, but died before his estate had been settled under it. His will was as follows: I, William Cooch, of Pencader Hundred, New Castle County and State of Delaware, being of sound disposing mind and memory, do make and declare this to be my last will and testament, hereby revoking all former wills heretofore made by me.

Item 1st. It is my desire and wish that my executor hereinafter named shall pay all of my just debts and funeral expenses as soon after my decease as possible.

Item 2d. I devise, give, and bequeath to my beloved wife, Tamar, all my personal property, and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor.

Item 3d. I devise, give, and bequeath to Dillon Hutchison the sum of five hundred dollars.

Item 4th. I devise, give, and bequeath to my brothers, Zebulon H. Cooch and Levi G. Cooch, the balance of my estate, to be divided between them share and share alike. It is my desire and wish that my executor hereinafter named shall sell all my real estate at public sale within one year after my decease, and convey to the purchaser or purchasers thereof a good and lawful deed or

deeds for the same. I do hereby nominate and appoint my brother, Levi G. Cooch, to be the executor of this my last will and testament.

In witness whereof I hereunto set my hand and seal this twenty-fourth day of July, A. D. one thousand eight hundred and sixty-six.

It was duly executed, and after his death without issue was duly probated, on the 7th day of June, 1869, in the office of the register of will in and for the said county, and as his brother, Levi G. Cooch, had died after the making of his will in his lifetime, letters of administration *c. t. a.* were granted thereon to the said Joseph W. Cooch. Afterward Tamar Cooch also died, leaving a last will and testament, which had been duly probated likewise, of which the said John Miller was appointed executor, and who had taken out letters testamentary thereon, and by her said will her interest under the said will of her husband was controlled and duly disposed of, and should come into his hands as her executor.

The bill of complaint further stated that after the death of the testator, William Cooch, his brother Zebulon H. Cooch, died intestate on the 18th day of December, 1870, leaving an only daughter his heir-at-law, named Caroline, wife of Nathan H. Clark, and the only children and heirs-at-law of his brother, Levi G. Cooch, at the time of his death were Joseph W. Cooch, Helen Cooch, William Cooch, Zebulon Cooch, and Mary B. Cooch, all of whom are still living and are made, together with the said Caroline Clark and Nathan H. Clark, her husband, defendants with the administrator of the said testator in this suit.

The real estate of the testator, however, had not been sold pursuant to his will, but in lieu thereof the said Nathan H. Clark and Caroline Clark, his wife, since the death of her father, Zebulon H. Cooch, had by their indenture of bargain and sale, bearing date the 4th day of February, 1871, for the nominal consideration of one dollar have released and conveyed all their interest in the said real estate to the said children of Levi G. Cooch, deceased, consisting of two tracts in said hundred, one of fifty-eight acres and two roods, with a grist mill thereon, and

the other of twenty-two acres two roods and twenty-five perches. And the said grantees are now in possession of said real estate, receiving the rents, issues, and profits of it, and holding the same as the owners thereof in fee simple, they having without any sale of it, or any part of it, raised, and through the administrator, also one of the owners thereof, the said Joseph W. Cooch, one of the defendants, paid off the said bequest of thirty-five hundred dollars to the widow made payable by the will specifically out of the said real estate. The said real estate was assessed in 1871 at twenty-one thousand dollars, and is conceded to have been worth sixteen thousand dollars over and above all liens imposed thereon by the said testator or existing upon it at his death, and is worth no less at this time.

The said Zebulon H. Cooch, named in the said will, was at the time of the making of it, in 1866, in comfortable pecuniary circumstances, living upon his means, a gentleman of leisure in the city of Paris. At the same time the said Levi G. Cooch was a farmer, also in comfortable pecuniary circumstances.

The administrator *c. t. a.* has settled two testamentary accounts under the said will before the register of wills in this cause, one on the 4th of February, 1871, and the other on the 5th of July, 1872, by which it appears that he has paid:

Funeral expenses,	\$84 66
-------------------	---------

Testamentary expenses, viz.:

Amount paid Register of Wills,	\$ 32 35
" " Printing,	18 50
" " Clerking,	30 00
" " Appraising, etc.,	4 00
" " Witness,	3 30
" " Recording,	9 00
	\$ 97 15
Amount paid Counsel,	\$395 00
Commission allowed Administrator by the	
Register,	660 51
	\$1,055 51
Carried forward,	\$1,237 32

Brought forward, ...	\$1,237 32
Debts proved accounts, ...	1,311 15
Bequest to Mrs. Cooch, payable out of lands, . . .	3,500 00
Taxes, ...	157 15
Goods taken by the widow at appraisement, . . .	60 00
Balance in hands at last settlement, ...	339 51
	\$6,605.13

In said accounts and settlements before the register, the said administrator charges himself with:

1st. The amount of the inventory and appraisement of the goods and chattels, ...	\$1,683 95
2d. Amount of sales in excess of inventory and appraisement, ...	62 88
3d. Cash collected from various sources, ...	220 67
4th. Dividend on policy, ...	29 20
5th. Judgment <i>v. G. P. Whitaker</i> , paid, ...	1,108 43
6th. Amount contributed by the heirs to pay to widow the bequest payable out of the real estate, ...	3,500 00
	\$6,605 13

The complainant as representing and in behalf of the legatees named in the said will of Tamar Cooch, deceased, claims that under the provisions of William Cooch's will his widow, the said Tamar Cooch, was during her lifetime entitled, and he, as the executor of her will since her decease, is entitled to all the personal property which belonged to the said William Cooch at the time of his death, and which passed under his will to his personal representative without diminution for funeral or testamentary expenses or for debts or other legacies, there being ample other property belonging to the estate of the said testator for the payment of all such expenses, debts, and legacies designated in his said will, and ordered to be converted into personalty, or at least that he is entitled to such property or its proceeds, or so much thereof as may be left after the payment of proper funeral and testamentary expenses and debts without

diminution for other legacies or devises, and has so made demand of the said administrator *c. t. a.*, who has refused so to account and settle with this complainant, claiming that he and those whom he represents are entitled to no preference in either of these respects under a proper and just construction of said William Cooch's will, either in equity or at law. And in order that this question might be fairly raised and settled this complainant has on divers occasions applied to the said administrator *c. t. a.* and his counsel, and urged them to seek the direction of a court of equity by a bill of interpleader or otherwise, so that the will might receive the construction of the court and the rights of the respective parties be authoritatively settled under its determination, but they have declined so to do, and therefore your orator comes into court here in order to have this question and his rights, and the rights of those whom he represents, determined in that behalf.

So far as it is necessary to repeat it, the prayer of the bill was that the court would give the just and true construction of the said will of William Cooch, deceased, and direct the defendant, the said administrator *c. t. a.* therein, and particularly: 1st, Whether under the said will the said Tamar, his widow, was or was not entitled to all of the personal property of the said William Cooch at the time of his death which passed under his will to his personal representative for administration without diminution for funeral or testamentary expenses, or for debts or other legacies under the said will, there being ample other property belonging to the estate of the said testator for the payment of all such expenses, debts, and legacies designated in said will and ordered to be converted into personalty: or 2d. To what extent under a just construction thereof the said Tamar was entitled in her lifetime, and the complainant, as her personal representative since her decease, is entitled. That complainant may have such further and other relief as the nature of the case may require.

The answer of the defendants admitted the allegations of fact contained in the bill of complaint, but denied that under the provisions of William Cooch's will, his widow, Tamar Cooch, was entitled to all the personal property belonging to him at

his death, without diminution for debts and legacies as alleged in the bill of complaint.

And of this opinion was the chancellor, who decreed that according to the true construction of the said will of the said William Cooch the personal property bequeathed to his wife, the said Tamar Cooch, was not by the terms of the said bequest and the operation of law exonerated from the payment of the testator's just debts and testamentary and funeral expenses, but that the said debts and expenses were primarily payable out of the said personal property, and were properly paid out of said fund by the administrator *c. t. a.* of the said William Cooch; and that only the balance of the said personal property remaining in his hands after the payment of the said debts and funeral and testamentary expenses, to wit, the sum of one hundred and two dollars and six cents with interest thereon, should be paid by the said administrator *c. t. a.* to the said executor of Tamar Cooch, the complainant in the case.

The chancellor read his opinion delivered in the case below as follows:

William Cooch in his last will and testament devised as follows:

ITEM 1st. It is my desire and wish that my executor, hereinafter named, shall pay all my just debts and funeral expenses as soon after my decease as possible.

ITEM 2d. I devise, give, and bequeath to my beloved wife, Tamar, all my personal property, and three thousand five hundred dollars in cash, out of my real estate, as soon as sold by my executor.

ITEM 3d. I devise, give, and bequeath to Dillon Hutchison the sum of five hundred dollars.

ITEM 4th. I devise, give, and bequeath to my brothers, Zebulon H. Cooch and Levi G. Cooch, the balance of my estate, to be divided between them share and share alike.

It is my desire and wish that my executor hereinafter named shall sell all my real estate at public sale within one year after my decease, and convey to the purchaser or purchasers thereof a good and lawful deed or deeds for the same.

The testator then appoints his brother, Levi G. Cooch, executor of his will.

The bill is filed for the purpose of obtaining from the court a construction of the will of William Cooch as to the rights of the respective legatees and devisees named therein; or, perhaps, to speak more properly, to have the rights of the executor of Tamar Cooch, and the rights of those whom he represents, determined by judicial construction. The material portions of the prayer are, "That this court will give the just and true construction of said will of William Cooch, deceased, and direct the defendant, the said administrator *c. t. a.* therein; and particularly: 1st. Whether under the said will, the said Tamar, his widow, was or was not entitled to all of the personal property of the said William Cooch at the time of his death, which passed under his will to his personal representative for administration, without diminution for funeral or testamentary expenses, or for debts or other legacies under the said will, there being ample other property belonging to the estate of said testator for the payment of all such expenses, debts, and legacies designated in said will and ordered to be converted into personalty; or, 2d. To what extent under a just construction thereof the said Tamar was entitled in her lifetime, and the complainant, as her personal representative since her decease, is entitled."

The executor of Tamar Cooch claims that she was entitled under this will to all the personal property of which William Cooch died possessed, or to which he was entitled at the time of his death, without any deduction therefrom on account of funeral and testamentary expenses or on account of the payment of debts and legacies; and to three thousand five hundred dollars out of the proceeds of the sale of the real estate; that by the bequest of *all* of his personal property he meant that there should be no diminution therefrom for any purpose whatever, and that whatever charges his estate might be subjected to in the course of its administration, the proceeds of the sale of the real estate and not his personal property was the primary fund for their payment. The opposite view is maintained by the respondents.

It is a general rule, a settled rule, that the personal estate is the primary fund for the payment of funeral and testamentary expenses, debts, and legacies, and this general rule must in every case be applied unless there appears from the whole, or some

part of the will, that a testator intends his real estate, or its proceeds, either of rents, or moneys raised upon the faith of it, or by sale, or in some other manner shall be charged with their payment; and unless it further appears in like manner that he does not intend that his personal estate shall be charged with their payment. It must satisfactorily appear that he not only intends to charge his real estate or its proceeds, but that he intends to discharge his personal estate from their payment. It was formerly held that this intention must appear from express words in the will. This doctrine is nowhere maintained at the present day. Had it been strictly adhered to and not departed from, such litigation would have been saved, and judicial decisions upon this subject would have been much more uniform and consistent. Courts have used different forms of expression in determining the rule to be applied in the solution of the question of primary liability between the personal and real estate. Some judges have said that the intention to make the real estate the primary fund must appear by implication plain; others by intention clear; others by irresistible conclusion; others, that the mind of the judge must be convinced that he is deciding according to what the testator intended; others, that the evidence of the intention to charge the real estate and to discharge the personalty must be sufficient to satisfy the judicial mind. It was doubtless the intention of the testator in this case that every provision of his will should be carried into effect. He intended that his funeral expenses and debts should be paid; that his wife should have his personal property and three thousand five hundred dollars out of the proceeds of his real estate; that Dillon Hutchison should have five hundred dollars, and that his two brothers should have the balance of his estate; and he intended that his real estate should be sold. He has not in express words said how, or out of what fund, the funeral expenses, debts and legacies shall be paid. He has not expressly charged either the personal property or the proceeds of his real estate with their payment. He has not by express words exonerated either from their payment. The question to be decided is not whether they shall be paid, but what fund, the personal property or the proceeds of the sale of the real estate, is primarily

liable for their payment. The intention of the testator, if that intention can be collected from his whole will, or from any part of it, must determine this question. There is nothing in this will to indicate the intention of the testator to charge the real estate or the proceeds of its sale with the payment of the funeral expenses and debts unless proof of that intention is afforded by the use of the words *balance of my estate* in the fourth item of his will. There is nothing in the will to show an intention to discharge the personal estate from their payment unless proof of that intention is afforded by the words *all my personal property* in the second item of the will. It will be observed that the testator has not in any manner, or for any purpose, blended his real with his personal estate, but has throughout his will clearly distinguished them. He has not directed his real estate to be sold and made the personal property and the proceeds of the sale of the land a single fund for the payment of his debts, funeral expenses, and legacies, and left the surplus proceeds of the sale of the real estate undisposed of, as in the case of *Sharpley v. Townsend*, 4 Harr. 337. In the latter case the court held that under its particular circumstances the sale of the real estate was a conversion out and out. In this case it nowhere appears that the testator ordered his real estate to be sold and to be blended with his personalty for any purpose; and he has not left the proceeds of its sale undisposed of, but, to use the words of the will, he has devised, given, and bequeathed to his two brothers the balance of his estate, to be divided between them share and share alike. The personal estate having been before given away in the second item of his will, the word *balance*, in the fourth item, can have reference only to the real estate or to the money arising from the sale of the real estate. The conversion under this will is, therefore, a conversion for the purposes of the will only, and not for all purposes whatever, which would be necessary for the purposes of a conversion out and out. Had the bequest in the second item of the will been *my personal property* instead of *all my personal property*, I presume it would not have been contended that the personal property was exempt from the payment of the debts and funeral expenses.

Do the words "*all my personal property*" have a fuller or

more extensive meaning than the words "my personal property"? Do not the latter words mean the same as the former? Under certain circumstances, the word "all" before personal property appears to have been considered as of considerable importance, and as showing an intention to bequeath such property as a whole and not as a residue. In *Viner's Abridgement*, vol. 8, there is a case in which the testator gave all his personal property to his wife, and five hundred pounds out of the sale of the proceeds of his real estate, and devised *his real estate to trustees to be sold for the payment of his debts and legacies*. Chancellor Harcourt decided in that case that the real estate devised for the payment of debts and legacies was the primary fund for their payment, and remarked that it was manifest the testator thought that all his personal estate was not sufficient for his wife, and therefore he gave her five hundred pounds out of the proceeds of the sale of his real estate. It will be observed, however, that in that case the real estate was expressly devised to trustees to be sold for the payment of debts and legacies, of which the legacy to the wife was one. This which, however, would only ordinarily have made the proceeds of sale auxiliary to the personal estate for the payment of debts, and not the primary fund for their payment in exoneration of the personal estate, would to my mind have been a more satisfactory reason for the decision than the one assigned.

Mr. Jarman, after reviewing the cases relating to this subject, remarks: "They authorize the proposition that whenever the personal estate is bequeathed in terms as a whole and not as a residue, and the debts, funeral, and testamentary charges *are thrown on the real estate*, this constitutes the primary fund for their liquidation." I know of no case, however, where it has been held that the bequest of personal estate in terms as a whole and not as a residue has been sufficient to make the real estate the primary fund for the payment of debts and legacies, when those debts and legacies have not been thrown upon the real estate otherwise than by the mere bequest of the whole or all of the personalty. They are not so thrown in this case, unless the intention that such a result should follow appears from a proper construction

of the words *the balance of my estate*, in the fourth item of the will. Do these words have the effect, when taken in connection with the word "all" in the second item of the will, to throw the debts, legacies, and funeral charges upon the real estate primarily and in exoneration of the personal estate? What are the meaning of those words and to what have they relation. In my opinion, the words "balance of my estate," mean primarily his real estate or the balance of the proceeds of the sale of his real estate after deducting from said proceeds of sale any sum or sums with which those proceeds have antecedently been charged; that the only primary charge upon those proceeds pretermittig, for the present, the question as to the legacy to Dillon Hutchison, is the sum of three thousand five hundred dollars bequeathed to his wife, and that the personal estate being the primary fund for the payment of the funeral expenses and debts, the personal estate must first be exhausted before recourse can be had to this balance. If after payment of the debts, funeral, and testamentary expenses out of the personal estate there should be a deficiency in whole or in part for the payment of the legacy of five hundred dollars, or if from a proper construction of the will the personal estate should not be subject to its payment, and it should appear when that question properly arises between parties who can raise the question that the whole frame and scheme of the will plainly shows that the testator intended the legacy of five hundred dollars to be paid absolutely and at all events (to use the language of the court in the case of *McLaughlin v. McLaughlin*, 30 Barr. 469), it will be time to determine the liability of the proceeds of the real estate for its payment.

That question, however, is not now before the court. It can only be raised in a proceeding to which the legatee and the devisees of the balance of the estate shall be parties. I decline, however, to enter any decree unless it be for dismissal of the bill, upon two grounds—first, the bill is filed by the executor of a legatee for direction to the administrator *c. t. a.* of the testator how to administer the estate, and not by the administrator asking such direction, and secondly, the bill contains no sufficient prayer for relief.

The parties having agreed that the bill should be amended so as to present a case for final decision, it was not dismissed, and the cause was continued with leave to amend according to the agreement of the parties to be subsequently filed. Afterward, at the February term, 1877, the bill having been amended, as per agreement filed, and the cause being submitted without further argument.

The chancellor said:

I adhere to the views heretofore expressed by me in respect to the primary liability of the testator's personal estate for the payment of debts, funeral, and testamentary charges. I must, in the language of Sir R. Malins, V. C., in *Powell v. Riley*, 12 *Equity Cases* 178, attribute to the testator the knowledge that his personal estate was the primary fund for the payment of his debts. With this knowledge he made his will, and nowhere therein declares, either expressly or by "implication plain," that he means to charge the real estate devised to his brothers with the payment of his debts, or that he means to exonerate his personal property therefrom. In the case of *Powell v. Riley*, the vice-chancellor, while holding that in that particular case the bequest to the wife was specific, says: "If the will had stopped after the bequest of all his household goods and furniture, live and dead farming stock, money and securities for money, goods, chattels, and effects, and all other his personal estate, to his wife, for her absolute use and benefit, it would not of course, have exonerated the personal property from the primary liability to pay debts." It is true, he subsequently remarks, "I know no reason whatever, and I know of no authority that decides that the words 'I give my household furniture' is other than a specific bequest;" and the solicitor for the complainant in this cause, if I understand him aright, was of the opinion that the bequest of William Cooch of all his personal property was a specific bequest, and therefore discharged from primary liability to pay his debts. In a case subsequent to the case of *Powell v. Riley*, the case of *Fairer v. Park*, decided in 1876, *Law Reports, Division 1, Chancery*, Nov. 1876, it was held that "a gift by will by a testator to his wife of 'all my

personal property, all sums of money which I may possess, or may be owing to me at the time of my decease, together with all the furniture, farming implements, and other things in the family mansion,' was not specific." In that case Hall, V. C., remarked, "The only question on which I wish to hear any argument is whether there was a specific gift to Agnes Park." After argument the vice-chancellor said: "I am of opinion that upon the true construction of this will there is not a specific gift of 'all sums of money which I may possess, or may be owing to me at the time of my decease, together with all the furniture, farming implements, stocks, and crops belonging to the Asby Hall estate, to the defendant, Agnes Park.'" The dispositions are, first of all, a gift of "all my personal property," and then the words which I have read are thrown in, not for the purpose of making anything specific, but for the purpose of preventing the possibility of a question arising as to the specified things being included under the terms "all my personal property." In the will under consideration the bequest of "all my personal property to my beloved wife, Tamar," is specific in no other sense than as being distinguished from the testator's real estate, or the proceeds of such real estate, and "all his personal property" being given to her was so given subject to that primary liability for the payment of the testator's debts, funeral expenses, and testamentary charges, from which he has not in his will, either by express words or implication plain, relieved it.

The will of the testator must, however, be reasonably interpreted. Having provided that his just debts and funeral expenses should be paid as soon after his decease as possible, and then having given all his personal property and three thousand five hundred dollars out of the proceeds of the sale of his real estate to his wife, there remained nothing out of which to pay the legacy of five hundred dollars subsequently given to Dillon Hutchison except the "balance of his estate," the proceeds of the sale of the real estate after the three thousand five hundred dollars should be deducted. The three thousand five hundred dollars has been paid by the person having the administration of the estate of William Cooch with money advanced by the

devisee of the real estate. Dillon Hutchison has died since the commencement of this suit, but his administrator is entitled to receive out of what the testator calls the "balance of his estate" the legacy of five hundred dollars, with interest thereon, or such part thereof as has not been paid. I therefore direct that a decree be drawn for the payment to the executor of Tamar Cooch, by the administrator of William Cooch, deceased, of the balance of the personal estate of said deceased, after paying the just debts, funeral expenses, and testamentary charges appearing on the account filed in this cause, with interest from the time when the same should have been paid, together with the costs in this cause, within three months or attachment.

Patterson, for the appellant: The will in question was presented to this court, as it was to the court below, for construction, and was that construction to be determined by artificial rules of law, or by the plain meaning and obvious import of the terms employed by the testator in it? The second item of it was as follows: "I devise, give, and bequeath to my beloved wife Tamar all my personal property, and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor." The chancellor erred in holding that this bequest of all his personal property to his wife was not specific in any other sense than as it was distinguished from his real estate, or, in other words, from the balance of his estate, for in this case it was that very distinction which constituted it a specific bequest; because the will provides for the payment of his debts and the other legacies or personal bequests out of his real estate, which is directed to be sold for those purposes. But with the view which he has taken of the construction to be given to the will, how could he make such a wide distinction between the debts and the bequest of five hundred dollars to Dillon Hutchison, and hold that the latter should be paid out of the real estate, while the former should be paid out of the personal property which he left as such at the time of his decease? His real estate was then worth at least sixteen thousand dollars. His debts and funeral and testamentary expenses amounted in the aggregate to two thousand eight hundred and five dollars and sixty-two cents.

He says there is nothing in the will to indicate the intention of the testator to charge the real estate or the proceeds of the sale of it with the debts and funeral expenses, unless proof of that intention is afforded by the use of the words *balance of my estate* in the fourth item of the will. But is there not a manifest intention indicated in it to exonerate all his personal property from the payment of them for the benefit of his wife? As to the effect of the words *all my personal estate* in a bequest to exonerate it from the payment of the testator's debt in the case of a will like this, he cited 1 *Rop. on Leg.* 476; 2 *Jarm. on Wills* 587. There was, however, not only an express exoneration of all his personal property from the payment of his debts, but a clearly implied intention indicated by the testator in the will that they should be paid out of the proceeds of the sale of his real estate. In the first item of the will he says it was his desire and wish that his executor should pay all his just debts and funeral expenses as soon after his decease as possible; in the second he gives to his wife all his personal property and three thousand five hundred dollars in cash out of his real estate as soon as sold by his executor; in the third he gives to Dillon Hutchison five hundred dollars; in the fourth he gives to his brothers, Zebulon H. Cooch and Levi G. Cooch, the balance of his estate, to be divided between them share and share alike, and subjoins to that the following: "It is my desire and wish that my executor hereinafter named shall sell all my real estate at public sale within one year after my decease, and convey to the purchaser or purchasers thereof a good and lawful deed or deeds for the same;" and, in conclusion, nominates and appoints his brother, Levi G. Cooch, the executor of it. The will was brief and concise in its terms, and he evidently desired and contemplated that everything to be done under it should be done as soon after his decease as possible, and particularly that all his real estate should be sold at public sale within the brief period of one year thereafter. And why was he thus particular that it should be sold in so short a time? He doubtless knew that his personal estate would be primarily liable for his debts, and that the debts of a testator must always be paid before any legacies can be, and inasmuch as he had given all his personal property

to his wife, according to his own intention and his own understanding of his will, he was thus particular to provide a substituted fund for the payment of his debts by the sale of his real estate within the time limited, and which was evidently his first, if it was not his only, reason for it, as no time was limited by him in it for the payment of the legacy out of the real estate to his wife, or for the payment of the legacy of five hundred dollars to Dillon Hutchison. Did not that provision of the will therefore clearly import and imply that both the intention and the understanding of it by the testator was that all his personal property, that is to say, all his goods and chattels, rights and credits, should become the absolute property of his wife upon his death, and that all the debts and liabilities both of himself and his estate in the settlement of it should in lieu thereof be paid out of the proceeds of the sale of his real estate? It was this consideration and the further and still larger provision which he wished to make for his wife of three thousand five hundred dollars in cash, that evidently induced him to direct the sale of his real estate, since he could not provide for her as he wished without doing it. *Powell v. Riley*, 12 *Equity Cases*. *Law Rep.* 175.

A bequest of all one's personal property by a testator having realty in itself necessarily implies a throwing of his debts upon the realty, and a simultaneous order for the sale of such real estate and its conversion into money by the executor is a contemporary provision by the testator for meeting such debts and other pecuniary legacies, 1 *Sto. Eq. Jur.*, secs. 572, 573; 2 *Jarm. on Wills* 587. A gift of all the personalty when there remains real assets sufficient to pay debts and other liabilities is in itself in equity a discharge of the personal estate and a charge on the realty. *Kightley v. Kightley*, 2 *Ves. Jr.* 329; 1 *St. Eq. Jur.*, secs. 558, 571. In the distribution of assets the court always applies those not specifically given to any one before those that are specifically given. 3 *Ves. Jr.* 552. And courts will subject lands to legacies *inter alia*, first, when they are converted into personalty, or out and out for general purposes; secondly, when it is a provision for a wife or child; and thirdly, when the words of the testator would charge it with debts in England. 3 *Ves*

Jr. 551; 4 *Harr.* 337; 1 *Ves. Sr.* 499; *Trott v. Vernon*, 2 *Vermt.* 708; *Pree. Ch.* 430; 2 *Ves. Jr.* 330; 3 *Ves. Jr.* 378; 2 *Ves. Sr.* 313. A court of equity will so marshal assets that so far as possible the whole will may take effect and all the legatees be paid. *Masters v. Masters*, 1 *Pr. Wms.* 422. The proceeds of realty by the conversion into personalty lose their character of realty and are liable to debts and legacies without any express provision; and where a testator combines real with personal generally, the real is subject to all the burdens of the personal *Kidney v. Coussmaker*, 1 *Ves. Jr.* 444; 2 *Binn.* 531; 6 *Binn.* 394. Under a devise of lands to be sold to pay debts and funeral expenses the personal estate was exempted without express words upon the evident intention. *Benton v. Knowlton* 3 *Ves.* 107. To exempt the personal estate from the payment of the debts, the intention may be collected from the whole will, and need not be *in totidem verbis*. *Tait v. Ld. Northwick*, 4 *Ves.* 824. If the intention of the testator to exonerate the personalty from the payment of debts be evident, it must be exonerated; and such an intent to exonerate it may be found not only in the manner in which the personal estate is given, but also in the manner in which the real estate is given. *Webb v. Jones*, 2 *Bro. Ch.* 60; *Hale v. Cox*, 3 *Bro. Ch.* 322; *Waring v. Ward*, 5 *Ves.* 670; 1 *Sto. Eq. Jur.*, secs. 571, 574; 2 *Mylne & Keene* 49; *Hancox v. Abbey*, 11 *Ves.* 186. To exonerate personal estate from the payment of debts, there must appear on the face of the whole will a manifest intention to that effect. *Driver v. Ferrand*, 1 *Russ. & Myl.* 681; *Greene v. Greene*, 4 *Madd. Ch.* 148. Equity will charge the real estate with debts in order to enlarge the fund for the payment of the legacies as well as the debts, whether the legacies be specific or pecuniary, provided they be not residuary. 2 *Pr. Wms.* 190, 330, 335. And when the personal estate is given in a will as a specific legacy, it shall not be applied in exoneration of the real estate. *Walker v. Jackson*, 2 *Atk.* 624; 1 *Wil.* 24. A specific bequest is merely the severance of that particular property from the great body of the estate and the specific gift of it to the legatee. 1 *Rop. on Leg.* 185, 186. A gift of all a testator's personal property as a specific bequest, there being real estate out of which the debts may be

paid, operates to exonerate the personal estate therefrom. *Mitchell v. Mitchell*, 5 *Mad. Ch.* 69; *Greene v. Greene*, 4 *Mad. Ch.* 148; 1 *S. & L.* 544; 1 *Rop. on Leg.* 479. In the case of *Powell v. Riley*, *Law Reports*, 12 *Eq. Cases* 175, decided in 1871, before Sir R. Malins, V. C., where a testator had bequeathed all his household goods and furniture, farming stock, moneys, goods, chattels and effects, and all other of his personal estate to his wife absolutely, and then devised a freehold estate for sale and payment of his debts and the surplus to his wife, and then devised another freehold estate to his wife absolutely, and other estates to her for life with remainders over, the freehold estate devised for the payment of the debts was insufficient for the purpose. It was held that the bequest of the personal estate to the wife was specific, and that such bequest and the freehold estate specifically devised for the payment of them must contribute ratably for the payment of so much of the debts as the said freehold estate was insufficient to pay. And in so ruling the V. C. cites without disapproval the cases of *Greene v. Greene* 4 *Madd.* 148; *Mitchell v. Mitchell*, 5 *Madd.* 69; *Lance v. Aglionby*, 25 *Beav.* 65; *Gibbertson v. Gibbertson*, 34 *Beav.* 354; and distinguishes the case before him from those of *Taylor v. Taylor*, 6 *Sim.* 246; *Tower v. Ld. Rosseaux*, 18 *Ves.* 132; and from that class of cases.

There being in this case a clear exoneration of the personal estate from its ordinary and primary liability for the payment of the debts, legacies, funeral, and testamentary expenses of the testator by his express declaration that his wife should have "all his personal property," and by his express direction for the conversion of all his real estate into money as a substituted fund for it for the payment of his debts, other legacies, funeral, and testamentary expenses, and only the balance of which fund was devised or bequeathed over, there could be no pretense and in fact no ground for the application of what might in ordinary cases be the rule in equity, and which in general is the same as it is at law. 1 *Cor. Ch. Ca.* 254; *Booth v. Blundell*, 1 *Mer.* 228; *S. C.* 19 *Ves.* 494; 1 *Sto. Eq. Jur.*, secs. 572, 573; *Law Reports*, 20 *Eq. Cases* 304; 42 *Barb.* 43.

Finally, the desire of the testator expressed in his will, that

his executer should within one year after his decease sell and convey all his real estate, was a conversion of it "out and out," and the proceeds are applicable to the pecuniary legacies. And as all his personal property as such is specifically bequeathed, his debts, legacies, funeral, and testamentary expenses are thrown upon the personal fund thence arising out of such out and out conversion of the real estate. *Sharpley and Wife v. Forwoods's Executor*, 4 Harr. 336; 2 Pr. Wms. 190; *Greville v. Brown*, House of Lord's Cases 688; 2 Jarm. on Wills 762; *Morris v. Morris' Executor*, 4 Houst. 414. In that case the sale of his real estate under the will of the testator was considered by the court to be an out and out conversion of it. There have been cases in which the real and personal estates have been administered *pari passu* when the testator has directed his real estate to be sold, and mixed the proceeds and his personal estate in one common fund charged either with debts, legacies, or annuities. *O'Hara on Wills* 224, and cases cited; *Powell c. Riley*, Law Reports, 12 Eq. Cases 175. And if the simple blending of the real and personal estates for joint administration subjects the mingled funds to the payment of debts and legacies, a *fortiori* does the conversion out and out of the realty into personalty, with a previous specific bequest by the testator of all his personal property to his beloved wife, so subject the fund thus arising.

Gray, for the respondents: The question was a single and simple one, and was not difficult of solution. The personal estate is the primary fund for the payment of debts even when the real estate is charged with them. Now, when there are no express words or directions in the will charging the real estate with the payment of the debts, what is sufficient to show a clear intention or a demonstration plain, or, in the words of Lord Eldon, what is tantamount to it, that the testator meant to exempt his personal and to charge his real estate with the payment of his debts? By judicial construction legacies were often charged on the real estate when the debts would not be.

It was a well-established and elementary rule in the administration of assets both in this country and in England that the

personal estate is the primary fund for the payment of debts and legacies. 4 *Kent's Com.* 420; 2 *Jarm. on Wills* 546; 1 *Sto. Eq. Jur.*, sec. 571; 2 *Vern.* 248; *Ram. on Assets*, c. 3, sec. 5; 1 *Redf. on Wills* 275, 276; *Hill on Trustees*, 350, 351; *Bispham's Equity* 321; *Snell's Princ. of Eq.* 221; *Smith's. Man. of Eq.* 270. To exempt the personal estate of the testator from this primary liability there must be a "clear intention" expressed by or "a demonstration plain" of such intention gathered from the whole will both to exonerate the personal estate and also to charge the real estate or some portion of it. 1 *Pr. Wms.* 291; 2 *Vern.* 183; 2 *Vern.* 43; *Walker v. Jackson*, 2 *Atk.* 624; 1 *Brown Ch. Ca.* 454, *in note*; 3 *Ves. Jr.* 103, 107, 111; 4 *Ves.* 816; 5 *Ves.* 540; 6 *Ves.* 567; 9 *Ves.* 447; 2 *Jarm. on Wills* 575, 576; 1 *Mer.* 192; 1 *Mylne & K.* 396; 10 *Beav.* 453; *Powell v. Riley*, *Law Reports*, 12 *Eq. Cases* 175; *Lupton v. Lupton*, 2 *Johns. Ch.* 614; 1 *Paige* 188; 14 *Mass.* 83; 6 *Cow.* 333; 1 *Barb. Ch.* 375; *Hawk on Wills*, *Am. Notes* 287; 1 *Ld. Ca. in Eq. Am. Notes* 646, 673; 2 *Ibid.* 92, 110.

The bequest of "all my personal property" is not sufficient to exempt the personal estate unless another fund has been expressly provided for the payment of the debts and the intention to exempt is apparent from the will. A specific bequest is a bequest of a specified thing, or an ascertained or defined part or portion of the personal estate separated and distinguished from the mass of it. A bequest of all one's personal estate is not technically a specific bequest, and in equity such a bequest is only called specific for purposes of construction and where the intention is otherwise expressed in the will that other property then the personalty shall bear the charges. That is to say, in such cases such a bequest is sometimes called specific, as distinguished from the real estate. *Howe v. Earl of Dartmouth*, 7 *Ves.* 137; *Walker's Estate*, 3 *Rawle* 229; *Woodward's Estate*, 31 *Cal.* 595, 602; *Redf. on Wills* 475; 2 *Wm.'s Exrs.* 1158, 1172; *Gross v. McMullen*, 2 *Del. Ch. Rep.* 227; 1 *Rop. on Leg.* 184, 186; 2 *Spence Eq. Jr.* 336, 341; *Ward on Leg.* (18 *Law Libr.* 10); *Fairer v. Park*, *Law Reports*, 3 *Ch. Div.* 309.

The desire of the testator that his real estate should be sold as stated in it, taken together with all the provisions of his will

did not make it an "out and out" conversion, or indicate an intention to charge on the land the debts and legacies. *McLeland v. Shaw*, 2 Sch. & Lef. 544; *Acroyd v. Smithson*, 1 L. C. in Eq. and Am. Notes 904; 1 Jarm. on Wills 473. The evident purpose of the direction was that the three thousand five hundred dollars bequeathed to the wife might be raised and the balance be divided between the brothers. The will does not blend but studiously keeps apart the real and personal estates. Then we have here a bequest to the wife of all the personalty subject to the burden of the debts and legacies which the law throws on it, and from which the testator has not seen fit to exempt it, and a devise to her of three thousand five hundred dollars out of the real estate, and then the balance of his estate to his two brothers. What was the balance? Clearly the balance of the real estate after the payment of the three thousand five hundred dollars expressly charged upon and taken out of it; because the whole personal estate, subject as above, had been disposed of, and therefore the word balance can have no other relation.

Finally, it is submitted that no case in England or in this country has ever departed from the general rule which he had indicated and exonerated the personal estate from its primary liability, unless there has been in addition to this disposition of the personal a devise of real estate to pay debts, or some charge upon or dedication of real estate for that purpose, or express exemption of the personal estate by unequivocal language, or, as it is expressed by Mr. Smith in his *Manual of Equity* 272; "If the real estate is directed to be sold for the payment of debts and the personal estate is expressly bequeathed to legatees, then the personal estate will be exonerated by necessary implication. But neither of these circumstances apart from the other, and from circumstances affording implication of intention, is sufficient indication of an intention to exonerate the personal estate."

The foregoing applies a *fortiori* to the case of legacies, which are always presumptively payable out of the personalty, and if there prove a deficiency for the payment of debts and legacies the legacies must abate, unless they are charged on the real estate. And real estate is never so charged unless the intention

of the testator so to charge it is either expressly declared or fairly and satisfactorily to be inferred from the language of the will. And especially is this true when the legacy is sought to be exclusively charged on the real estate in exoneration of the personal. 2 *Redf. on Wills*, ch. 1, sec. 15.

Comegys, C. J., delivered the following opinion: The controversy between the parties in this case arose out of the will of William Cooch (the husband of the appellant's testatrix) which is in these words:

"In the name of God, Amen. I, William Cooch, of Pencador Hundred, New Castle County, and State of Delaware, being of sound and disposing mind and memory, do make and declare this to be my last will and testament, hereby revoking all former wills heretofore made by me.

"ITEM 1st. It is my desire and wish that my executor hereafter named shall pay all my just debts and funeral expenses as soon after my decease as possible.

"ITEM 2d. I give, devise, and bequeath to me beloved wife Tamar all my personal property and three thousand five hundred dollars in cash out of my real estate, as soon as sold by my executor.

"ITEM 3d. I devise, give, and bequeath to Dillon Hutchison the sum of five hundred dollars.

"ITEM 4th. I devise, give, and bequeath to my brothers, Zebulon H. Cooch and Levi G. Cooch, the balance of my estate to be divided between them, share and share alike.

"It is my desire and wish that my executor hereinafter named shall sell all my real estate at public sale within one year after my decease, and convey to the purchaser or purchasers thereof a good and lawful deed or deeds for the same.

"I do hereby nominate and appoint my brother, Levi G. Cooch, to be my executor of this my last will and testament.

"In witness whereof," etc.

The appellant conceived his testatrix to be entitled under the will to all the personal estate of her husband without any deduction therefrom whatsoever; and the respondents not admitting such claim, the bill which forms part of the record before

us was brought to determine that question. The case presented by it having been so conducted on both sides as to require of the chancellor a decision of the matter in controversy, he made it on the 21st day of February last, denying the claim of the complainant in his court. From that decision this appeal was taken, and we have been favored by the chancellor, in the opinion expressed by him in the cause, and now read to us, with the reason or grounds upon which he based his decree. Such reasons are full and lucid; and we proceed to give our views of the law by which this court is to decide whether they are sufficient or not in our judgment.

There are certain well-established and reasonable rules which serve as a sure guide to courts in the decision of such questions as that presented by the record in this case, and which are by no means new, but are so old as to have become venerable landmarks of equity decisions in cases of this nature under wills. They are those for the administration of the estates of all testators, and have so long prevailed as to be entitled to the appellation of maxims. They are as follows:

1st. The personal estate of a testator is the primary fund for the payment of his debts and of such legacies as he may choose to give. 2d. In the payment of legacies those of a specific nature are to be paid before general ones. 3. The real estate is not liable for the payment of either debts or legacies, unless the testator has unequivocally so declared in his will.

With respect to this rule we may now say, as we shall repeat hereafter, that in this State all the property of a testator is subject to the payment of his debts, but the real is only to be resorted to for that purpose, even in the case of liens upon it, after and not until the personal estate has been exhausted, which still preserves the rule that the personal estate is the primary fund for the payment of a testator's debts. Of course, we are not to be understood as speaking of liens which the creditor proceeds to enforce.

We did not understand the learned solicitor for Tamar Cooch's executor to make any contention with the respondents upon this view of the law, but he did insist, and exhibited his usual industry in collecting and citing authorities to sustain his view,

that according to the true legal construction of the will of her husband, her executor is entitled to the whole personal estate of the testator, and that, by force of the terms used by him, all his debts, funeral charges, and expenses of administration are thrown upon the proceeds of the sale of the real estate, which is substituted in lieu of the personal for the payment and discharge of them; and he founds or places his argument or contention upon the express words of the second item of the testator's will: "I give, devise, and bequesth to my beloved wife Tamar all my personal property, and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor."

If the question presented by the solicitor for the appellant had never been decided, we might possibly take the view of it submitted by him and conclude that the chancellor erred, and that the appellant could claim the whole personalty of the testator, and that such claim should be allowed; but such question has been passed upon and determined over and over again by court of equity, whose concern it is chiefly to interpret wills; and never in cases having no special features more than this case has, has it been decided otherwise than that the personal estate must first be applied to the payment of debts before resort can be had to the real estate. The very words used in this case, "all my personal estate," have, in the numerous instances produced by the learned solicitor for the appellees in his forcible argument in their behalf, undergone the most critical and exhaustive examination that minds of the highest order of legal acumen could give to them, and they have always (where there were no expressions in the will that required a different construction) been held to mean simply, the balance of the personal estate that should be left after the payment of the debts of the testator and other legal charges, such as those of burial and of administration. We are not aware of any cases in contravention of this view, or that would justify us, as a court of review, in departing from the old accustomed pathway of the law. In looking through this whole case, with the will of William Cooch and all its provisions or clauses in our mind, we do not see how we can do otherwise than confirm and establish the chancellor's decree.

A case in some respects similar to the present (though there

were many different circumstances or facts in it) came before this court and was decided at the June term, 1872. It was that of *Morris et al v. Morris' Executor*, iv. *Houston* 414, involving the construction of Elijah Morris' will. While the expression in it is not the same exactly as that in Cooch's will, yet the question was so much the same that the court felt called upon and properly to express its opinion in language involving the very considerations this case requires. His Honor, Judge Wootten, in the judgment of the court then declared, and speaking the sense of all its members, said the import of the words "balance of my whole estate, after deducting the aforesaid legacies," being in question, "this cannot mean the whole original estate, but it is the residue remaining after the payments of the debts; that residue is what constitutes a man's estate; and when we speak of our own or another's estate, we mean that which remains clear for distribution after the payment of debts. Whatever is necessary for the payment of a deceased man's debts belongs to his creditors and cannot properly be considered any part of his estate for distribution, and especially when we apply the act of distribution, for no matter how much property he may have in possession, if it is not more than sufficient to pay his debts he has no distributive estate. This is true not only in a common sense view but in legal contemplation." We not only feel ourselves bound by the words of the court spoken by its organ for that case, but independently we decide that there is nothing in the will of William Cooch that would justify us in reversing the decree of the chancellor, which, to say nothing of its sufficient reasoning, is strictly in accord with the law as we take it to be.

In this case there is no question between legatees; it is simply one between the devisees in effect of the real estate and the legatee of the personal; and we have been unable to find any case nor has the learned solicitor for the appellant furnished us with any, which decides that the words, all my personal estate, in a will like that before us, have been held to cast the payment of debts, expenses of administration, and legacies upon the realty. Much stress was laid by him upon the fact (which he assumed) that the bequest to the widow was specific, but we do not agree with him that it was specific in any legal sense although it was of

all, etc. A legacy is only specific when it designates a particular thing or things by specific description, as my bay mare, my gold watch, my shares of stock in such a bank, or the like; or mentions some place where the thing itself can be found, as my bank notes in a certain drawer; or indicates some part of the personal estate consisting of various articles which can be easily distinguished and set apart from the residue, as all my personal property in a certain room, house, hundred, county, etc. Cases of a similar kind will be found referred to in *Part II of Redfield on Wills*, at page 475; where will also be found authority for the principle that a bequest of all a man's personal property is not a specific legacy. Where it is of all merely, indicating no locality or more particular specification, it is general, the same as is imported by the words rest and residue, because such word means what every testator must be taken to know—the balance after payment of debts, etc.—the law being that the personal estate must first be exhausted before resort can be had for such payment to the realty. Every testator is presumed to know the law with respect to the liability of his estate for his debts, and, consequently, to make disposition of it in accordance with such knowledge. Therefore it is that where a testator even uses such sweeping and apparently conclusive words in disposing of his personalty as all my personal estate, the law still holds that he only meant such portion of it as should be left after taking from it all that it was liable to, either as matter of legal responsibility for debts, funeral expenses, and charges of administration, or on account of some further deduction which the provisions of his will requires—for example, a specific legacy. The authorities are abundant upon this point, and were fully laid before us in the argument in June last; it is unnecessary to recite them here. And further, there is in our opinion no warrant for the position assumed by the learned solicitor for the appellant that this bequest is specific. We have before given examples of specific legacies; we now refer to authorities in like cases of specification. *Sayer v. Sayer*, 2 Vern. 688; *Prec. Ch.* 392; *S. C.*, 5 Ves. 150, 156; *Green v. Symonds*, 1 Bro. C. C. 159, in notes; *Moore v. Moore*, *Ibid.* 127; *Gayre v. Gayre*, 2 Vern. 538; *Shaftsbury v. Shaftsbury*, *Ibid.* 747; *Laud v. Devaynes*, 4 Bro. C.

C. 537; *Clark v. Butler*, 1 Mer. 304. The principle is the severance of the particular property from the great body of the estate and the specific gift of it to the legatee. 1 *Roper on Leg.* 243. Where there are no such restrictive expressions a legacy of personal estate generally will be general and not specific; and even the circumstance that the real and personal estates are blended together will make no difference, although as to the former the devise must necessarily be specific. *Ibid.*; 2 *Wms. on Exrs.* 849.

But, of course, the case is different when a testator exonerates his personal estate from the payment of his debts and casts that burden upon his realty. Whenever that occurs, the primary liability is transferred from the personal and thrown upon the real, and the latter is the source to which the executor must first apply. There is no doubt of that. When the intention of a testator to create a new fund for the payment of his debts appears plain, that fund must first be resorted to if he has so expressed himself. But before that is taken as a fact there must be no doubt left upon the face of the will; it must plainly appear by it that the testator so meant. This is not to be settled by conjecture or mere inference, but is to be shown by unequivocal language or expressions contained in the paper itself. There must be something the courts will recognize as sufficient for that purpose to justify them in departing from the old established certain rule that the primary fund for payment of debts is a testator's personal estate. And our system of settlement of estates under which all a man's property, as well real as personal, is responsible for his debts, does not affect the rule; for the primary liability is still on the latter, and there remains until it is exhausted. In England the real estate was not liable for simple contract debts at all unless made so by a testator; but here it has always been otherwise, and the law as uniform as it is now. But notwithstanding the difference, the first fund to be taken has always been the personal, the real being merely auxiliary or secondary.

Now, in looking through the will that forms part of the record before us, we do not find any clause, word, or expression that would allow us to depart (if we were inclined to do

so) from the established line of decisions upon questions such as are by that record presented to us. There is certainly nothing said about exempting the personal estate from the payment of the testator's debts, nor is any language used that can fairly be construed as favoring the notion of such an intent. There is not even any charge of the real estate with them, though that by itself would mean nothing more than that they should be paid at all events. Nor does the testator direct that, to insure the payment of his debts, his real estate should be turned into money and made part of the personal. If he had gone as far as that even, still the first fund to be taken would be personalty; as, by a well-known rule, the residue of such real estate after such charge upon or with respect to it had been liquidated would descend to the heir or pass to the devisee *qua* realty, he having the right to redeem it from sale and take it as heir or devisee, according as it may have been undevised or devised.

But, in reality, the will itself negatives the idea that the land of William Cooch was devoted by him as the first fund for the payment of his debts. The language of the first item is that the executor shall pay all the just debts and funeral expenses of the testator as soon after his decease as possible; and in the second paragraph of the fourth item he expresses his desire and wish that his real estate shall be sold within a year from the time of his death, thus allowing the executor a full year to find an advantageous period to offer his land for sale. If anything could be wanting to furnish us with assurance that the conclusion we are about to announce is the correct one, these clauses would be sufficient to do it. The testator evidently contemplated that his personal estate should be at once, in the usual course, converted into money to satisfy his creditors, and his land in a reasonable time to raise the money to be paid out of it.

The question is: Did William Cooch by his will intend that his real estate should be resorted to before his personal in the settlement of his estate? As we do not find in that will any language that requires of us to say that he did, the bequest to his wife being a general and not a specific legacy, and that bequest alone being the source to which we have been referred and must resort for such a conclusion, and the two clauses of the

will we have just referred to being, as we think, at variance with the idea of substitution, we are of opinion and decide that the decree of the chancellor in the court below was right and should be affirmed.

Wales, J.: The general rule is well settled that in the absence of express words or manifest intent of the testator, his personal estate is primarily liable for the payment of his debts. *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; *Samwell c. Wake*, *Ibid.* 145; *Walker v. Jackson*, 2 Atk. 625; *Tait v. Lord Northwick*, 4 Ves. 824. The doctrine is clearly stated by Sir William Grant in *Hancox v. Abbey*, 11 Ves. 186, as being perfectly established, that in order to exonerate the personal estate there must be either express words or a plain intention. Precise and specific words of exemption are not necessary, but it is sufficient if the intention can be collected from the whole will to give the personal estate exemption from the debts. Mr. Jarman, in his treatise on wills, after a full discussion of the authorities, remarks: "These cases seem to authorize the proposition that whenever the personal estate is bequeathed in terms as a whole, and not as a residue, and the debts, funeral, and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation. 2 *Jarman* 586. This rule and the principles on which it is founded have been fully recogized and accepted by the courts in this country. 1 *Story's Eq. Jur.*, sec. 572-3; *Lupton v. Lupton*, 2 *Johns. Ch.* 623; *Walker's Estate*, 3 *Rawle* 229. In England real estate is not liable for the payment of simple contract debts. Here that estate is subject to the demands of all the creditors of the deceased, but not until the personal estate has been exhausted, when it becomes the auxiliary fund for the payment of debts. Hence the doctrine of the English courts of equity has been adopted, that not only must the testator charge his lands with the payment of his debts, but must also show his intention to exempt the personalty. If the personal estate has been specifically bequeathed, and the lands directed to be sold for the payment of debts, the personal is held to be exempted by necessary implication. But the testator is always presumed to act upon the legal doctrine that the personal

estate is the natural and primary fund for the payment of all debts until he shows some other distinct or unequivocal intention. In *Lupton v. Lupton*, Chancellor Kent states the rule broadly and as not admitting of dispute, that the real estate is not as of course charged with payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and dispositions of the will. It is not sufficient that debts or legacies are directed to be paid—that alone does not create the charge—but they must be directed to be first or *previously* paid, or the devise declared to be made *after* they are paid. Where there is an express bequest of all the testator's personal estate (with or without an enumeration of particular articles) and the will also contains a charge of debts upon the real estate, these facts have sometimes been held to favor the exemption of the personalty. But the position is nowhere sustained that a specific bequest of the personal estate, *without* a charge on the lands for the payment of debts, will exonerate the former. *Hill on Trustees* 352; 1 *L. C. in Eq.* 918.

Applying these rules of construction to the interpretation of Mr. Cooch's will, in which are no express words of exemption, resort must be had to the intention of the testator in order to ascertain what was his wish in respect to the payment of his debts. The first item contains the general and usual direction to his executor to pay his debts and funeral expenses. By the second he bequeaths to his wife "all my personal property and three thousand five hundred dollars in cash out of my real estate as soon as sold by my executor." By the third he gives to D. Hutchison five hundred dollars. By the fourth he gives to his brothers "the balance of my estate to be divided between them, share and share alike." Finally, he empowers his executor to sell his real estate at public sale within one year after his decease. The question is, What does the testator mean by "the balance of my estate"? Do these words signify what may remain or be left after all the personal property has been given to the wife, and the debts and legacy to Hutchison have been paid out of the proceeds of the sale of the land? And is the inference plain from the context of the whole will that the

intention is to case the burden of the debts upn the real estate? It would be begging the question to say that the inquiry suggests a doubt, and there is therefore no plain declaration or manifest intent to change the legal order of payment. It cannot be denied that in the expressions and terms of this will there is room for conjecture that the testator may have desired to leave to his wife all his personal property free and discharged from the payment of his debts, but there is no plain declaration or manifest intent to that effect. He neither discharges the personal nor charges the real estate, and he is, in the language of Judge Story, presumed to act upon the legal doctrine that his personal estate is the natural and primary fund for the payment of his debts until some other distinct and unequivocal intention be shown. The object in selling the real estate appears to have been to secure the cash payment of thirty-five hundred dollars to his wife, and the division of "the balance" of the proceeds of such sale between his two brothers. This was the purpose of the conversion of the real estate, and in this respect it differs from the case of *Sharpley's v. Foxwood Ex's*, 4 Harr. 336, where the court held that if there be no direction as to the object of the conversion, and the land is directed to be sold, it is a change, out and out, of the realty. Here there is a special direction to pay the wife thirty-five hundred dollars out of the real fund and to divide the balance between the brothers. There is, then, no fair or satisfactory inference to be drawn from the context that Mr. Cooch intended to exonerate his personal estate. As was said by the master of the rolls in *Brydges v. Phillips*, 6 Ves. 570, it is only a probable conjecture. There is no certainty, no clear, unambiguous intention to be collected from the whole will, that he meant that. There is no ground upon which to judicially collect a settled intention. The word "all" prefixed to "my personal estate" is not sufficient to make a specific legacy, which is of a particular and individual character, precisely described and limited as to its nature, value, or the place where it may be found. But admitting the legacy to the wife to be a specific one, the debts must still be paid out of the personalty, unless there is at the same time an express charge on the realty for that purpose, or an evident intention to make the charge. A testator

•

must comply with the rules of construction and the settled principles of law which have been established as well to carry out his intention, where it is consistent with them, as to administer the estates of deceased persons according to a fixed and regular order. Looking at the will alone, and extracting its meaning by intrinsic evidence, there is wanting that clear unequivocal, and manifest intent which is required to exempt the natural and primary fund, and to throw the burden upon the real estate.

Wooten and Houston, Judges, concurred.

v

SUPERIOR COURT.

FALL SESSION.

1879.

JOHN N. WRIGHT *v.* JOHN D. RODNEY, administrator of
JAMES H. MOORE, deceased.

The court will not award a writ to put in possession the purchaser of premises at sheriff's sale under execution process where the legal title of the defendant in the writ thereto is in dispute and he was out of the possession of them at the time of the sale.

RULE to show cause wherefore a writ should not be granted to put the plaintiff in possession of a tract of four acres of land and a small dwelling-house thereon, sold by the sheriff on a writ of *venditioni exponas* at the suit of the plaintiff against the defendant and brought by him and returned to this term of the court.

The defendant appeared at the return of the rule and contested the issuing of the writ of possession, and on the hearing it appeared that one Samuel Tull went into possession of a larger tract of eighty acres, of which the four acres in question were claimed to be a portion, under a contract to buy it and an alienation bond therefor from Jacob Nicholson in the year 1850, and while so in possession of it sold it to James H. Moore, who died in possession of it in 1872. It was proved by a daughter of his that he went into possession of the land about twenty-five years since and died in possession of it about seven years ago, and that she had since been in possession of the four acres in dispute and the small frame house on them until the

same, with her household goods in it, had been removed entirely from them without her knowledge and while she was away. It was admitted that Robert Tull, a son of Samuel Tull, had entered and taken possession of the four acres in question some time before the sale of them by the sheriff under the writ.

The Court, on the facts proved, discharged the rule.

Moore, for the plaintiff.

Nicholson and Cullen, for the defendant.

JOSEPH R. LAYTON AND WIFE v. EDWARD W. HOUSTON.

The statute in relation to the writ has not dispensed with the necessity of a *ca. sa.* and a return of *non est inventus* thereon before the commencement of an action of debt on a recognizance of bail taken in an action of trespass *quare claussem fregit*.

THIS was an action of debt on a recognizance of bail in an action of trespass *q. c. f.* against John Breerly, and recovery of judgment therein by the plaintiffs for fifty dollars damages and costs, and which had not been paid, tried before Houston and Wales, Judges, Comegys, C. J., absent. The record of the same was offered and read in evidence by the counsel for the plaintiffs, from which it appeared that at the return term of the original writ therein the defendant appeared, and the said Edward W. Houston became special bail for him in the action. It also showed the recovery of the judgment in it as alleged, and that a writ of *feri facias* had been issued upon it and returned *nulla bona* and *non sunt inventi*. The pleas were *nul tiel record*, no *ca. sa.* issued and returned *non est inventus* before the commencement of this action, and release and issues thereon. The counsel for the plaintiffs upon the production of the evidence above mentioned rested his case.

Cullen, for the defendant, submitted a motion for a nonsuit on the ground of the fact and the complete defense alleged in the

second plea, which was denied by the plaintiffs, but was proved by the record produced in evidence on their behalf. No writ *o ca. sa.* had been issued on the judgment, as appeared from it with a return of *non est inventus* thereon as to the defendant in it, to fix the liability of the bail which the law imperatively requires. 2 *Tidd.* 1098; 3 *Johns.* 514; 16 *Johns.* 117; *Rev. Code, sec. 11, p. 637.*

Layton, for the plaintiffs: Our statute in relation to the writ had dispensed with the necessity of a *ca. sa.* in such a case. 1 *Tidd.* 304, 306.

The Court granted the motion for a nonsuit.

GOVE SAULSBURY, administrator of JOHN GREEN, deceased,
v. CHRISTOPHER FORD and JAMES ANDERSON, survivors of
BENJAMIN WHITE, deceased.

In an action of *scire facias* on a judgment when the only plea is payment, the defendant is entitled to the opening and conclusion.

SCIRE FACIAS by the plaintiff against the defendants on a judgment in this court for ninety dollars and fifty-eight cents, entered on a warrant of attorney April 1st, 1862, in the lifetime both of John Green and Benjamin White, deceased, to which payment was the only plea entered, and when called for trial the question arose between the counsel and was presented to the court whether the plaintiff or the defendants were entitled to the opening and conclusion of it.

The Court held that as payment was the only plea in the case, and the judgment therefore stood admitted by the defendants as good and undisputed when entered on the record, the duty and the burden of proving the payment of it rested on them, and they were entitled to the opening and conclusion of the case.

Day and Saulsbury, for the plaintiff.

R. Harrington and Wolcott, for defendants.

CHARLES E. PARKS *v.* JOHN K. EVANS and JAMES EVANS.

A statute of Missouri allowing ten per cent. interest, published among the revised statutes of that State in 1865, presumed to be still in force in 1877 in the absence of any evidence to the contrary.

And a promissory note bearing ten per cent. interest dated at Westport, Missouri, will be presumed to have been made there in the absence of any evidence to the contrary.

ASSUMPSIT on a promissory note made by the defendants payable to the order of the plaintiff for three hundred and eleven dollars and ninety-one cents with interest at ten per cent. from the date of it, and dated Westport, Missouri, November 16th, 1877.

Massey, for the plaintiff, after proving and putting it in evidence, offered in evidence the revised statutes of Missouri published by authority of the State, to show that ten per cent. was the lawful rate of interest on such a debt by the statute of it.

R. Harrington (*Ridgely* with him), for the defendants, objected that it was not sufficient and was therefore not admissible in evidence for that purpose, because it was published, as appeared on the title-page of it, in the year 1865, and the note was not made until 1877, twelve years afterward, and *non constat* after the lapse of so long a time that such was the law or statute of the State on the subject when the note was made.

Massey: *Prima facie* it was sufficient and admissible for the purpose for which he had offered it in evidence, for having been the law of the State on that subject as late as 1865, the court would presume that it was still the law of it in 1877, and not that it had been changed in the meanwhile in the absence of any evidence whatever to warrant such a presumption.

The Court was of this opinion and admitted it in evidence.

The counsel for the plaintiff then put it in evidence and rested his case.

On which the counsel for the defendants moved a nonsuit

upon the ground that he had failed to prove, as he should have done in such a case, that the note was made in the State of Missouri. By the statute of this State it was void for usury, and without proof of that fact, as a fact in the case, no action here could be maintained upon it; and if not required in such a case to be actually and affirmatively proved in our courts, it may soon open a very easy and convenient side way for the evasion of our statute against usury in the making of promissory notes particularly.

But the Court overruled the motion and said, the presumption both in law and fact is that every promissory note was made where it is dated as we term it, if any place is stated in the date of it, and in this case the place inserted and stated in the date of the note constitutes an express admission on the face of it by the signers and makers of it, the defendants, that it was made at Westport, Missouri. It is, however, but a presumption merely, subject to rebuttal at any time.

JOHN A. BANCROFT & CO. v. THE WILMINGTON CONFERENCE
ACADEMY.

The secretary, and as such the keeper of the books, of an incorporated company, who is counsel for it in the trial of a case against it in court, is not a competent witness in it.

For the transaction of any business of an incorporated company which requires no seal, the company may appoint an agent without the use of its corporate seal, or of any writing even, the same as a natural person may, for such business, and no preceding appointment of the agent by the company for the transaction of it is necessary, if it is subsequently sanctioned either directly or indirectly by the company.

ASSUMPSIT for goods sold and delivered, consisting of school-room furniture, such as chairs, desks, and blackboards, ordered by and furnished to the principal of the school in the academy and put into and use in it, of which, under his contract with the trustees of the institution and incorporation, he was to have all the receipts without any remuneration to them.

Day, for the defendant, on the proof of these facts and the resting of his case by the counsel for the plaintiffs, moved a nonsuit because sufficient proof had not been produced that the principal of the academy, as he styled himself in his examination as a witness, was the agent of the corporation for the purpose of contracting the bill in question, or had authority as such to bind the corporation for the payment of it. The court cannot judicially notice that a corporation has authority to appoint an agent for any purpose without, at least, the production of its charter and by-laws which show it. *Ang. & Ames on Cor., sec. 277; 13 N. H. 352; 10 Pick. 325; 4 Greenl. 44; 5 Wheat. 420; 17 Mass. 1; 8 Mass. 291.*

The Court, without hearing the counsel on the other side, overruled the motion for a nonsuit.

Day then offered himself, as the secretary of the company and the official keeper and custodian of its books and record of proceedings, as a witness for the defendant to prove that another person constituted its appropriate and duly appointed agent for the purpose of attending to and transacting such business.

But the Court declined to admit him because he was then of counsel for the corporation in the case, and was not the only person who could prove its books and record of proceedings.

Another person was then called as a witness by him who proved that the Rev. Mr. Hutchins was the duly appointed agent of the trustees and the institution during the years 1874 and 1875, and Rev. Mr. Williams was during the same time the superintendent of the academy, but never was the agent of the trustees to procure furniture for its school apartments, and during that time the bill in question was contracted.

The act of limitations had been pleaded, but was now withdrawn.

The grounds taken by the respective counsel in the argument of the case before the jury will appear from the charge of the court.

The Court, Comegys, C. J., charged the jury as follows: This is a suit by the late firm of John A. Bancroft & Co. against the Wilmington Conference Academy to recover the sum of eighty-nine dollars and forty-one cents, the amount of a bill of goods alleged to have been sold by the plaintiffs to the defendant, at two different times, in the fall of 1874. The defendant is a corporation of this State duly created by law, and transacts its business, which is that of maintaining a public school in this town, and the goods referred to are three teachers' desks, three wood arm-chairs on pivots, and seven blackboards, all such as are necessary for a school of the character of that kept by the defendant or under its authority. It is not disputed that the articles mentioned were sent from Philadelphia, where they were purchased, at or about the time of their purchase, that they were received at the Academy, that they have been there or with the property of the corporation ever since, and that they are now in the academy building. It would seem, then, that the defendant ought to pay the plaintiffs for these goods; but there is refusal to do so upon the ground that they were purchased without the authority or knowledge of the defendant, and that the defendant does not recognize them as its property. The counsel for the defendant therefore asks the court to charge the jury that to make the defendant liable in this case it must appear that the witness, Mr. Williams, who bought the goods, was the agent of the defendant at the time; and he insists that as it appears from the minute book of the corporation, in evidence before you, that the president and three of the board of trustee were authorized to perform that service, it must appear that the witness was appointed in like manner and that such fact can only be shown by the records of the academy; and he has cited authorities in support of his prayer. On the side of the plaintiffs we are asked to charge you that formal action by the corporation was not necessary for the appointment of Mr. Williams as agent to buy these goods, not, in fact, was any appointment whatever necessary as a precedent act on the part of the defendant, but that the goods having, as he contends, gone into its possession, it is as much liable to the plaintiffs for their value as if the party buying had been clothed with authority the most

formal for that purpose; and he has furnished us with authorities in support of his view of the case.

No one can be held bound upon a contract unless he make it or authorize someone to make it for him. If he take the latter course he is said to act by an agent. This is all very plain, and we say to you that unless some statute require it, or some act is to be performed requiring a seal, no form of writing is necessary for the appointment of an agent, or writing at all, but he may be appointed by mere words or word of mouth. In other words, in all the ordinary, every-day transactions of men, agency may be created without any formality. In all cases of agency the fact of its existence may be proved and must be proved in suits against the principal where there is writing by the writing—for no man is to be held for the contract of his agent acting beyond the scope of his authority—and where there is no writing by verbal proof. When agency is thus established by proof, the subject of it, the agent, has the same power precisely within the scope of his authority as the creating authority, called the principal, has. If, therefore, the agent should be authorized by a writing under seal duly acknowledged according to the statute to make a conveyance of real estate however valuable, the deed executed by such agent in conformity with the terms of the writing, or power, would be as effectual to pass the title of such estate as if signed and sealed by the principal himself. So also if he were authorized by words only to make a purchase or sale of personal property, his act in buying or selling, provided he kept within the limit or scope of his authority, would be as valid and effectual a contract of purchase or sale as if his principal had done the dealing himself. The agent, acting as such strictly—that is not transcending his authority—stands in the place and stead of his principal, and for the transaction performed is in law the same as the principal. This is no new law in this State, but has been announced by this court over and over again, and in every case where the question of agency arose and called for such expression.

The facts of this case seem to be the following, in substance: The witness, the Rev. Mr. Williams, was employed by the

defendant to conduct its business of instructing youth, and resided with his family in the building owned by it, without any accountability for rent, and with the privilege of making what he could by the school—the defendant supplying the necessary furniture, etc., for school purposes. While he was so engaged, and other furniture being desired, the board of trustees, in whose general charge the affairs of the corporation were by the act of incorporation, appointed three of their number to act with their president in the purchase, if necessary, of such furniture, by a resolution or order adopted, as appears by the minutes, on the 17th day of June, 1874. In the month of September of that year one of the trustees and Mr. Williams visited several places in Philadelphia to look at and price such things as were needed, and went to the store of the plaintiffs in the first instance. As the goods of the plaintiffs were not acceptable on account of price, the other stores were resorted to. No goods whatever were bought while the trustee was present, but two bills were made by Mr. Williams, one with Milton Jackson, which the defendant paid, and the other with the plaintiffs, which has not been paid and the defendant refuses to pay it. In each case the goods were duly sent forward by the merchants and were received at the academy building and put into use as part of the equipment of the school. The defendant by its payment of the bill of Milton Jackson adopted the act of Mr. Williams in making the purchase. Such adoption by payment is of the same significance in effect as if he had been appointed by special act of the defendant beforehand to make the purchase. If a man adopt the act of another made in his behalf, though without any authority for so doing, it has the same effect precisely as if he had originally ordered or authorized it. The adoption makes it his own—and though no sort of agency to do the act existed at the time it was done. The want of original authority may be shown by the most indisputable proof, and yet the acceptance of the act done and enjoyment of its fruits will bind the party too strongly to be loosed by technicalities or plea of want of original power. There can be no ground to dispute this proposition, which is founded in that pure system of morality which underlies our common-law system as well as that of equity

Besides, the books are full of cases in support of it were any to deny it.

Having given you an exposition, briefly, of the general law of agency and its application to cases like the present is claimed to be by the plaintiff's counsel, we come now to the very matter n hand or question which you are to decide—for it is but one, there being no contest about the value of the goods sold by the plaintiffs, nor dispute that they reached the building of the defendant and were incorporated with their other school furniture—the latter fact is sworn to by Mr. Williams, and his testimony is not gainsaid. Upon what ground, therefore, you ask, does the defendant resist payment for the goods? Upon this ground—that the witness had no authority to make the purchase, of which the defendant was entirely ignorant until suit was brought upon the bill, or shortly before that time—his counsel averring that the conversation with Mr. Massey, stated in the argument of that gentleman, was understood by him to apply to the bill of Milton Jackson, which was paid as I have stated. Of course, the declaration of the defendant's counsel is not evidence at all; but at the same time you must not lose sight of the fact that Mr. Massey is not absolutely clear that he gave the names of his client, though he thinks he did; but he does remember that the bill was mentioned by him as one for school furniture. So was the one paid; and therefore Mr. Day may have had that bill in his mind in his assurances that it should be paid. That is a matter which, among others, we leave to you. The defendant's ground then is, that though the goods were in fact sent to the academy and mixed with its other furniture, yet the defendant is not liable for them, he having given no authority to buy them. Besides, he claims that the defendant had no knowledge that any such goods were received at the school. This brings us to the consideration of a point very strongly insisted upon by the defendant's counsel—which we take to be this—that this corporation had no right to appoint an agent otherwise than by the act of its board of trustees, much less to adopt the service of a volunteer, as it is insisted Mr. Williams was, and bind the corporation thereby. But be that as it may, having acted in the business of making appointment of agent in

the persons of the three trustees and president, and that fact appearing by its record, and no appointment of Mr. Williams appearing thereby, no proof of agency on his part can be made by parol or verbal testimony, and therefore no responsibility of the defendant can arise or be supported by the plaintiffs.

As a general proposition, it may be stated that a corporation can only act by its seal. It is an invisible body, purely a creature of statutory creation, having neither form nor essence, but existing nevertheless, and possessed of very great power. In the case of this corporation defendant there seems by the act of its creation to be ample powers to carry on a public school and own property of great value for that purpose. These bodies are made up of one or more individual living persons; they compose them, but the body itself is a distinct thing. Were it not, those who compose it might unite and do a corporate act; whereas they cannot, but the corporate act must be done by the invisible body. How then does this body act? The answer is, by its seal; and this is true of corporations as a general principle and is not to be controverted. But in the progress of time and in the increase of the affairs of men, and the necessity in large and complex enterprises where associations of men with their capital become necessary, and the business multifarious and less simple than the transactions of men originally were, it became impracticable to use the seal of corporations in all of their transactions; but their ordinary business came to be performed by agents or officers without such formality, employing the corporate seal only in the doing of strictly corporate acts, or such as by law can only be done by a natural person by seal. There is, as we all know, a vast mass of business, some of it of the highest importance, which is transacted by officers of corporations without any authority under seal, and oftentimes in writing even. Nor are these acts such as come within the authority of the office of the agent. As an illustration I may speak of the satisfaction of judgments by cashiers of banks, who usually have no authority in writing for that purpose, and act simply from usage, and, in fact, convenience. This is a very important act, the discharging a debt of record by indorsement of the cashier, and yet no court would allow his right to do so

to be questioned upon any ground of want of authority under seal or in writing. Proof of usage by the bank or adoption of the officer's act would be held sufficient without showing any authority for the power exercised. A much stronger case is that of transfer of a judgment to a co-debtor or co-surety who had paid the debt; and here this court, should such a case arise before it, would not allow the bank to disclaim the act on the ground that the officer had no written or verbal authority. Usage in the conduct of the business of the bank in such cases would be sufficient authority, and no impeachment of it would be allowed except upon the ground of fraud. Other illustrations might be given of the performance of acts for a corporation without written, or in fact, any verbal authority; but it is conceived that enough has been said to enable you to understand what is meant with respect to the management of its business by a corporation. The truth is that within a comparatively few years past the law of corporations has undergone very many material changes with respect to their mode of action. Corporate seals, which were anciently the only proof of their acts, are now only used in what I may call the most solemn cases, the conveyance of title, release of liens, making of formal contracts requiring from individuals the use of seals, etc. They have become so common, and their business so like that of natural persons, that the law, with that wisdom which has ever characterized the courts in the adaptation of it to the changing relations of human affairs, has been modified and shaped so as to conform it to the exigency of human affairs with which it had concern. Therefore it is that we now find many things done by the mere agents or servants of corporations, and recognized as legal, which in former years, and not so far back as the date of some of the valuable authorities cited by the learned counsel of the defendant in his argument addressed to the court, were not. Every few years changes of an important character take place in corporation law by judicial construction or decision; in fact, since the case chiefly relied upon by him, *Salem Bank v. Gloucester Bank*, 17 Mass. 1, decided near sixty years ago, it has been so molded and shaped by necessity to promote the convenient administration of corporate affairs, that but for certain expressions and the peculiar

nature of the being or creature itself, the law now applying to it could hardly be distinguished in any respect from that applying to individuals. There is, therefore, nothing in the general law of corporations as now administered requiring them to appoint an agent to perform any ordinary service by writing under seal, or by writing at all; nor is there any law by which a corporation is not as much bound for the acts of those whom it employs as an individual person is. It would be very hard indeed if every one, before he could engage in the most trivial transaction with a servant of a corporation with respect to anything that concerned it, should be held to an inquiry into his authority, any more than in the case of the servant or agent of an individual. Corporations are too common now and transact too many of the simplest affairs of life to make such a requirement reasonable.

Having given you to understand, as we best could, the law of agency generally, and having also informed you that such law applies as well to corporations as to persons, you have then to determine whether Mr. Williams, in buying the furniture supplied by the plaintiffs, was acting as the agent of the defendant. No direct authority is shown for him, but he purchased of another merchant at that time goods of like character as those for which the plaintiff sues, and which were paid for by the defendant; and he was accompanied in his round of examination among the dealers in such goods by one of the committee appointed by the resolution before referred to. It is denied by the defendant, it is true, that the witness had any authority to act for or in its behalf, but the fact remains that one of the bills he made was paid without any demur whatever. This is a circumstance of importance not to be overlooked by you in considering this case. It appears, also, as has been stated before, that the goods which are the subject of the controversy before the court were duly sent to and received at the academy or place of business of the defendant, were put into use or mingled with the other furniture of the school, were in the building when it was burnt, but were rescued from it, afterward were used at another place where the school was conducted, were subsequently resorted to the rebuilt structure, and are there at this time. They consist of three teachers' desks, as many wood chairs on pivots, and seven blackboards, one

of them six feet long by three and a half wide, all prominent articles calculated to attract the eye in a moment. Now it may be that these conspicuous articles were not observed by the trustees, and we must believe that they escaped the attention of that one of them who gave testimony upon that point before you. But would it not appear unreasonable that none of that body saw these valuable and striking articles? You are to judge of this. These pieces of school furniture were in the school building of the defendant four years after their purchase and before the bringing of the suit to recover for them. It is for you to say whether the board of trustees of the academy, or any but a very few of them, at least, could have been ignorant that they were other goods than those bought by Mr. Williams from Milton Jackson, and which they had paid for. These trustees or managers of the business of this corporation must be held, in all reason, to the same knowledge of facts concerning the property visibly in their possession as an individual would be. There is no law of this kind which does not equally apply to both.

Further, a man may adopt or ratify the act of another as his own, though he may never have directly or indirectly employed him to do it. If a person, without any authority whatever from one of you, gentlemen, should presume to sell your horse, although his act would be wholly unwarranted, you might, if you chose, confirm the transaction. It would be yours, then, by adoption, and you would be bound by it the same as if you had authorized it at first. Here there would have been no agency, whatever, either express or implied in the first instance, and yet the adoption or recognition of the act would be the same as if the volunteer had been authorized to do the act by the most solemn instrument of writing. Nay, although the doing the act by the officious person had been expressly forbidden, yet if it had been accepted by the party he could not afterward escape from the effect of his adoption by disclaiming the authority of the person acting, or by proving that he was forbidden to act at all. It would be very hard if it were otherwise; because in such cases it would operate a fraud upon the innocent party who confided in the representations of the assumed agent whose acts were adopted by him whom he professed to serve.

The plaintiffs had a verdict.

AYRES STOCKLEY, administrator of WILLIAM A. CLOUD, deceased, v. JOHN H. BEWLEY and WILLIAM G. TEMPLE, administrators of WILLIAM TEMPLE, deceased.

Upon the trial of an issue to ascertain and determine by the verdict of a jury if any and what amount is due on a judgment of several years' standing, where both of the parties are dead, and entered on a judgment bond and warrant of attorney by the administrators of the plaintiff five years after his death, a due bill given by him to the defendant for a sum of money subsequent to the date of the bond may be given in evidence against the judgment; but not that a deed was made on the same day as the bond by the plaintiff and wife for a lot of ground to the defendant to be followed up by proof that it was given for the consideration of the deed, and that the defendant soon after built a dwelling-house upon it which increased the value of it very much, but long afterward discovered that it was bound by a mortgage executed by Temple and wife to another person before the sale of it to him, and that the premises had since and very recently been sold on it at sheriff's sale to pay the mortgage, was not admissible evidence in such a case.

The presumption of payment from lapse of time is to be calculated from the entry of the judgment, and not from the date of the bond and warrant of attorney on which it is entered, but when it applies to the bond it will be too late to enter the judgment under the warrant of attorney executed at the same time with it.

THIS case came up on an issue awarded at the preceding term to ascertain and determine by the verdict of a jury whether any, and if so what, amount is due on a judgment in this court in favor of the administrators of William Temple, deceased, against William A. Cloud, No. 351, to April term, 1868, for the real debt of one hundred and fifty dollars, with interest from June 5th, 1851, entered by confession on bond and warrant of attorney, October, 23d, 1868, with the following credits indorsed on the bond: October 13th, 1853, forty-eight dollars, and January 7th, 1856, twenty-four dollars and twenty-eight cents. The bond was dated June 5th, 1851, and was payable in fifteen equal annual installments. The record likewise showed that a writ of *feri facias* had been issued on it to April term, 1859, and returned levied on goods to the amount of the debt, and that a writ of *venditioni exponas* had afterward been issued on it to April term, 1872, but there was no return of it, and the ex-sheriff then in office testified that it never was in his hands;

that he heard about it but it never came to his hands. William Temple died in 1863 and William A. Cloud in 1875. In addition to the foregoing set-offs the defendants admitted the plaintiff was entitled to a further credit of sixteen dollars on March 13th, 1853, while the defendants also claimed the amount of a book account from March 10th to September 15th, 1862, one hundred and twenty-two dollars and seventy-nine cents.

Fulton, for the plaintiff, then proved and offered in evidence a due bill from William Temple to William A. Cloud for sixty-six dollars and thirty-seven cents, dated February 11th, 1863, for work done by him about that time.

Massey, for the defendants, objected to the admissibility of it in evidence until it had also been proved that it was for work and labor and materials furnished, as alleged in the plaintiff's affidavit on which the judgment had been opened and the issue awarded, because the plea or defense of payment in the trial of it imported payment in money and not a set-off.

Fulton denied that such was the law in a case like this, which was on what is termed the equity side of the court and without any pleas entered in it, and if he had time he could show that such had been the decision of the court.

The Court overruled the objection on the ground that the only issue joined in the case had been formed under the order of the court as one of fact, and was in the broadest terms, whether anything, and if any what, was then due on the judgment in which the rule in relation to the plea of payment in an action at law did not apply, but the practice of the court had always been in such cases to admit such proof as had been offered to show that the judgment has been in fact paid either in whole or in part.

He next offered in evidence a deed from Temple and wife to Cloud for a lot of ground at Smyrna Landing, dated the same day as the bond on which the judgment had been entered, to

show, as he said that he expected to follow it up with further proof, that the judgment bond was given for the consideration of the deed, and that Cloud had afterward built a dwelling-house on the lot, increasing the value of it very much, but had long after that discovered that the lot was bound by a mortgage of it before its sale to him by Temple and wife to another person, and that the premises had since and very recently been sold on it at sheriff's sale to pay the mortgage.

Massey objected to the admissibility both of the deed and the proof with which he proposed to follow it.

And the Court ruled it out, *Wootten, J.*, remarking that it involved an inquiry more proper for a bill and answer in the court of chancery than in the Superior Court in such an investigation as was then before it.

Massey then proved the public advertisement of the administrators of Temple to all his creditors to present their claims to them for settlement, dated June 2d, 1863, and that the account of Cloud as then presented in the case against his estate was not probated by him until 1872.

Fulton cited *Rev. Code* 649, *sec.* 22; 2 *Houst.* 206. There was a *fi. fa.* execution issued on the judgment and levied on the goods and chattels of the defendants to the full amount of the debt and costs, on which a *venditioni exponas* was afterward issued but never returned, and upon those facts the presumption of law was that the judgment was paid. 4 *Harr.* 114; 1 *Del. Ch. Rep.* 365; 2 *Harr.* 4; 1 *Del. Ch. Rep.* 177; 5 *Otto* 173. The bond was payable in ten annual installments of fifteen dollars each, and the legal presumption of payment arising from lapse of time applied to each installment as it respectively fell due. 3 *Harr.* 421; 5 *Harr.* 42; 1 *Harr.* 500; 5 *Harr.* 506; 2 *Houst.* 400, 574; 4 *Harr.* 527.

Massey: A set-off could not be pleaded to a judgment, nor anything else which could not be pleaded to a *scire facias* upon

it. 2 *Houst.* 206, and what Houston, J., said in it. The fact which appeared as to the levy of the goods under the *fi. fa.* on the judgment that they remained unsold absolutely negated any presumption either in law or fact that the judgment or the writ had been paid, but the statute of March 4th, 1875, had annulled that principle of the common law totally in this State. *Rev. Code* 675, *sec.* 2. That no credit could be allowed on the judgment for work and labor without proof that it was to be so credited by the express agreement of the parties. The last item in the account of Temple was entered in 1862, and no presumption of the payment of the judgment could arise in less than twenty years after it was entered. The last installment of the bond and the judgment upon it was payable in 1861, the judgment was entered in 1868, and not only the confession of it was an admission by Cloud of the debt at that time, while the *fi. fa.* upon it and levy on his goods was a further rebuttal of the presumption if either had been necessary in the case. The case was then argued at length on the facts and the questions involved in them before the jury.

The Court, Wootten, J., charged the jury:

GENTLEMEN OF THE JURY: You are sworn to try an issue of fact as to whether anything is due and how much on a certain judgment in favor of John H. Bewley, surviving administrator of Wm. Temple, deceased, against Ayres Stockley, administrator of Wm. A. Cloud, deceased, the judgment having been entered by confession under warrant of attorney on the 23d of October, 1868, as of the April term of that year, and number 351, the real debt as entered on the record being one hundred and fifty dollars, with interest from June 5th, 1851, the date of the bond on which the judgment was entered, payable in ten equal annual installments, with interest on the whole amount due when the respective installments fell due. On this bond, which was put in evidence by the defendant in the judgment, are indorsed two credits, the one on the 13th of October, 1853, for forty-eight dollars, which is equal to and satisfies the two first installments with the interest which had then accrued on the whole amount of the bond, and the other credit indorsed on the bond was on

the 7th of January, 1856, for twenty-four dollars and twenty-eight cents, which is equal to and pays the third installment, and leaving an excess of two dollars and eight cents to be so much toward the fourth installment. In addition to these two payments, the plaintiff in the judgment, by his counsel, admits a further payment of sixteen dollars to be credited on the bond or judgment as of the 13th of March, 1853, being a balance due Cloud on settlement, as appears on the books of Wm. Temple. Here the plaintiff in the judgment rested his case, claiming the balance appearing to be due on the judgment after deducting the payments just referred to, which is claimed to be two hundred and eighty-two dollars and sixty-eight cents, including debts, interest, and costs.

Here at this stage of the case the administrator of Cloud, who was the obligor in the bond and defendant in the judgment, lays before you his defense of law and evidence to show that the judgment has been paid or that the bond was paid in the lifetime of Temple and before judgment was entered, Temple, according to the evidence, having died on the 27th of May, 1863. The first branch of his defense is that Cloud held a due bill against Temple for the amount of sixty-six dollars and thirty-seven cents, dated February 11th, 1863, which with interest, they say amounts to one hundred and three dollars and eight cents. They also claim the amount of a book account against Temple running from the 10th of March, 1862, to the 15th of September, 1862, amounting to one hundred and twenty-two dollars and seventy-nine cents, which they allege was for work on vessels. These sums are claimed as payments or by way of set-off to the bond and judgment, which, if allowed by you, will extinguish the entire debt alleged to have been due to the administrator of Temple under the judgment in question. The second branch of the defense set up is that a *fi. fa.* was issued on the judgment and a levy made on property sufficient to pay and discharge the debt, and that, therefore, the judgment was by legal presumption paid, and that there is now nothing due on it. Thirdly, it is insisted that the claim of the plaintiff in the judgment is barred by the statute of limitations, or perhaps I should say by the presumption arising from the lapse of time, etc.,

so that it is insisted that on all or either of these grounds of defense, if sustained, there is nothing due from the administrator of Wm. A. Cloud to the surviving administrator of Wm. Temple, deceased, and, therefore, they claim your verdict accordingly.

To these several propositions or branches of defense, the administrator of Temple, who is the plaintiff in the judgment against Stockley, the administrator of Cloud, by his counsel replies, first, that as to the due bill and book account there is no evidence of any agreement between the parties that they were to be credited on the bond or to be received for so much in payment thereof, and that in the absence of such evidence they contend that they cannot be allowed by you as payments on the bond or judgment. And if they are offered, as they seem to have been by way of set-off, they are objected to, being, as the plaintiff in the judgment alleges, barred by the statute of limitations. And as to the allegation that the judgment is barred by the presumption of payment, it is replied that, before the presumptive bar operated a judgment was entered in this court under the warrant of attorney to confess judgment, which warrant of attorney was attached to the bond and authorized the confession of judgment. To this, the administrator of Cloud, by his counsel, replies that the confession of judgment in no wise interferes with or prevents the bar arising from the lapse of time, because it is said it runs from the date of the bond, and that its operation is not stayed or prolonged by the judgment.

I have now, gentlemen, presented this case to you in all its aspects as clearly and comprehensively as I am able to do with the limited time afforded me, and it now becomes my duty to announce to you the opinion of the court on the law in reference to all the matters which have been submitted to you on both sides.

We say to you, then, that the judgment given in evidence to you is a valid one and the amount of it is due from the administrator of Cloud to the administrator of William Temple, deceased, unless the matters of defense set up, or some of them, have been established to your satisfaction when you shall have been instructed as to the law applicable to them. And now we have to say to you that to entitle the defendant in the judg-

ment to the benefit of the due bill and book account, for they both stand on the same principle, it must be proved to your satisfaction that there was an agreement or understanding between the parties, Temple and Cloud, that they were to be considered and received by Temple as credits or payments on the bond in question to the amount of them respectively, otherwise you cannot allow them as credits or payments on the bond or judgment, though true it may be that Temple owed the due bill and account *non constat*, that they were to go for so much in payment of the bond, and if Temple had a book account against Cloud, in the absence of such an agreement and understanding he had the right to apply any due bill or account Cloud had against him to his book account or to the bond in his discretion and as he might think proper, and if they are to be considered as a set-off, and the counsel for the administrator of the defendant in the judgment insisted on their allowance as such, we have to say to you that if the due bill was given by Temple to Cloud more than six years, and of that fact you are to judge and determine—it appears to be dated on the 11th day of February, 1863—you have it before you, however, and must pass upon it, being a matter of fact for your consideration and determination and not ours; and so too as to the book account of Cloud against Temple, it is our duty to say to you that if it has been three years since the last item of that account was charged without some recognition of its existence and admission that it was due and existing within three years anterior to this time, it too is barred by the statute of limitations and cannot be allowed by you as a credit on the judgment in question or in payment for so much thereof—the same qualification or principle of recognition or admission applies to the due bill, except the time in which they must be made in reference to the due bill is six years. But we say to you, further, that if they are not barred, of which fact, however, there is no sort of doubt, they could not be allowed by you as credits or payments on the bond and judgment unless, as we have before said, there is satisfactory proof of an agreement between the parties that they should be so allowed, and I believe it is not pretended that there was any such evidence given to you.

Now, gentlemen, I come to the question presented by the counsel for the administrator of Temple, who was the holder of the bond against Cloud, and on which the judgment before us was entered in answer to the allegation on the part of the defendant in the judgment by his counsel, that the debt on the bond and judgment is barred by the presumption of payment arising from the lapse of time, being twenty years as to a bond or judgment. In all cases it is, however, but a presumptive bar, which may be rebutted by payments of interest or principal within the twenty years, or by an admission of the existence of the debt and that it is due and unpaid. There is no evidence of this sort and none was offered, and did the case stand on the bond alone the bar of the presumptive payment would operate and nothing could be recovered on the bond except such installments as did not fall due until a period within twenty years from the date of the bond; but before the presumption of payment arose the debt had passed to a higher grade by the judgment entered in this court on confession by authority of a warrant of attorney, a judgment having been entered on the 23d of October, 1868, about two years and five months before the presumptive payment could arise. Now we do not say that the entry of this judgment, had it been after the lapse of time, which raises the presumption of payment, would remove the bar; on the contrary, we say it would not; but a judgment having been entered before the bar was operative, the debt passed to one of a higher grade, that of a judgment, and any future bar based on the presumption of payment from the lapse of time must run from the date of the judgment and not from that of the bond. Judgment on confession without writ is of the same character as one obtained in a suit with writ. Now how would the presumption of payment operate as a bar to a judgment recovered in a suit by writ on a bond and judgment confessed at the trial term, as is an every day's practice in this court—how is the one distinguished from the other? In such a case from what time would the presumption of payment begin to run—from the date of the bond on which suit was instituted or from the date of the judgment? Clearly from the date of the judgment. The bond in either case merges and is only after judgment

the basis of the judgment, and not evidence of the debt, and in no wise can it be used as such. The judgment is of a higher grade, made so by recognized principles of law, and is the proper evidence of the debt, and all proceedings to avoid the payment of the debt must be directed against the judgment, not the bond. We say to you, then, that this judgment having been obtained on the 23d of October, 1868, the presumption of payment by the lapse of time does not arise, and the judgment is therefore not barred, unless some circumstances have been proved coupled with the lapse of a shorter period than twenty years from which you can infer payment. We are not aware of any circumstances which have been relied upon in the argument; but that is a matter for your consideration and not our province.

There is one other matter which I have not noticed in its order and will do so now, though it is not at all important to the discussion of the case. The counsel for the plaintiff in the judgment gave in evidence a *fi. fa.* and levy made under it on the property of the defendant, which proceeding was stayed by the plaintiff's order. It was insisted that this was evidence to save the plaintiff's debt from the operation of the presumptive bar from the lapse of time. We think not, being the act of the plaintiff, who cannot by his own acts remove or prevent the bar. This proceeding was sought to be used by both parties, the counsel for the defendant in the judgment claiming that the levy, made on property to an amount sufficient to pay the debt, the presumption was in the absence of the sheriff's return, the writ being lost, that the execution was settled; this presumption, however, is made unavailable by the statute to be found on page 675 of the *Revised Code, section 2*; and aside from this the defendant's counsel called the late sheriff, in whose hands the execution was placed and who made the levy, and he testified that he never received the money under the execution or any part thereof, and that all the money he received was applied to prior executions; so that all of this is out of the way—there is nothing in it for either side.

I believe, gentlemen, I have now said all that is necessary for me to say, and I hope I have made myself sufficiently intelligible

to be understood by you. You will now take the case and decide it on the evidence before you and the law, as I have announced it to you, according to the dictates of your best judgment.

THOMAS I. GUENFORD and GEORGE W. HAYES *v.* PETER LOOSE.

In an action for damages for cutting the belt of a wheat-thresher and loss of time in the use of said wheat machine, before a justice of the peace, the judgment for the plaintiff was reversed because it appeared to have been given mainly if not solely for the consequential injury alleged.

CERTIORARI. The docket entry of the justice was action for damages for cutting belt of wheat-thresher and loss of time in the use of said wheat machine. Demand, one hundred dollars, and judgment thereon for the plaintiff below.

The exception was that the justice had no jurisdiction of the cause of action set forth in the written statement filed by the plaintiff before him and returned with the record as above.

Reed, for the plaintiffs in error: The cutting and repairing of the belt simply could have cost the owner and the plaintiff in the judgment but little, it was therefore manifest from the record that the consequential damages thereby sustained in the loss of the use of the machine actually constituted and was made the main if not the sole ground of the action and of the judgment given in it by the justice, but justices of the peace have no jurisdiction of consequential injuries when thus directly sued for before them.

The Court so held and reversed the judgment.

GEORGE H. HOLLIS v. ISAAC W. VANDERGRIFF.

There is no material difference in the meaning of the statutory provision and of the rules of the Superior Court, No. 6 and No. 7, on the subject of a defendant's duty to file with his plea an affidavit denying his signature to and the obligation of a promissory note, when a duly certified copy of it is filed by the plaintiff with his declaration in the action. And if such an affidavit of denial be not so filed in such a case by the defendant, he cannot prove a material alteration in any part of the note on the trial. Nor will he be allowed to file such an affidavit at the trial.

THIS was an action of *assumpsit* by George H. Hollis against Isaac W. Vandergrift severally upon two promissory notes for one thousand dollars each, made the same day, January 1st, 1877, one payable in twelve and the other in fourteen months, by John A. Vandergrift, Isaac W. Vandergrift, and Leonard G. Vandergrift, to the plaintiff, and was heard for the first time at the last May term of the court, but the jury, being unable to agree upon a verdict, were discharged, and it now came up for another hearing before the court and jury at this term. *Ante*, p. 521.

Lore, for the defendant, after the notes, without any proof of their making or signing by the defendant or any other maker above named, had been put in evidence by the counsel for the plaintiff, called to the witness stand the subscribing witness to them to prove that they had been materially altered in certain parts of them so as to vitiate and avoid them since they had been signed by the defendant and the other makers of them.

Higgins, for the plaintiff, objected to the admissibility of the proposed evidence. Upon filing the declaration on the notes the plaintiff had, in conformity with the provisions of the statute and the rules of the court on the subject, filed duly certified copies of the notes with it in the office of the prothonotary, but the defendant had not, in compliance with the same, filed any affidavit therein denying his signature to the notes or the obligation of them on any ground whatever, and without such an affidavit so filed and so denying his signature to them,

or the obligation of them, he was now absolutely estopped both in law and fact from denying either, and the necessary effect and conclusion of it was that they thereby stood admitted by him on the record itself, which he could not be allowed to contradict.

Lore: There had been no change in or tampering with any of the signatures to the notes, and he could not pretend to deny the genuineness of them, for in that respect they were precisely the same as they were when they were signed by the makers and when they left the hands of the defendant. How, then, could he possibly make such an affidavit? Such a construction of the rules and the statute as was contended for on the other side would require such a denial against any and every good defense against a promissory note, even to that of payment.

Moore, for the plaintiff: The statute and the rules referred to which were equally obligatory with it, meant more than a denial of the signature simply of the defendant, for they mean and intend nothing less than the denial of the execution by the defendant of the identical promissory notes which by true and sworn copies had been duly filed in the office of the prothonotary with the declaration in the action. If they had since the making and signing of them been changed or altered in any material respect whatever without the knowledge and consent of the defendant, they are not only not the promissory notes which he signed and made, but they were absolutely null and void by reason of it, and have no binding obligation upon him. The learned counsel had early stated to the court that he observed and became well aware of the fact as soon as he saw the copies of them on file in the prothonotary's office that the notes had been altered by having the words "or order" inserted in them next after the name of the payee in them, but his sole defense, it now seemed, was on a ground which was perfectly apparent to him from the time he first saw the filed copies of them.

Lore then suggested that the rules of the court, six and seven, which were not referred to on the former trial, were much

broader in their terms and meaning than the provision of the statute on the same subject, and denied the validity of them on that ground, and the power and authority of the court to amend or add to the express legislation of the State even on the subject of its own rules, particularly in a matter which so seriously affected the trial of causes and the legal rights of parties before it.

The Court sustained the objection and ruled out the proposed testimony, holding that there was no material difference between the meaning of the rules and of the statute on the subject, and remarked that they had not been satisfied, upon further reflection, with their ruling on the question at the last term.

Lore then moved for leave to amend by filing such an affidavit of denial at the present stage of the trial which the defendant was prepared to do.

But the Court, after full argument on both sides, declined to grant leave to amend.

The case afterward proceeded to a trial before the jury, and the plaintiff had a verdict for one thousand six hundred and nine dollars and fifteen cents.

DOUGLASS M. MCCOY v. THE PHILADELPHIA, WILMINGTON
AND BALTIMORE RAILROAD COMPANY.

In an action on the case for a personal injury the result of negligence, if it be alleged in the narr that the plaintiff was thrown from his carriage violently upon the ground, and was wounded and bruised, etc., he cannot prove a personal injury inflicted in a different manner.

Exemplary or punitive damages, as they are termed, cannot be recovered in an action on the case for consequential damages.

The municipal corporation of the city of Wilmington has the power to forbid by ordinance any railroad company to leave any engine, train, or car stationary on any track owned or used by it where it is crossed by any street of the city for a longer time than ten minutes except in case of an accident,

and it is in violation of the common law as well as of the ordinance to do so.

But any negligence on the part of the plaintiff which contributed to produce the accident and consequent injury is a complete legal defense to such an action. The care required of him, however, to prevent or avoid the accident is only ordinary care, and not extraordinary care, but it must be in proportion to the danger to be avoided; the greater the danger in the way the greater is the care required to avoid it, or, in other words, it is such care as a reasonably prudent man under the peculiar circumstances of the case would exercise to preserve himself and property from injury, and this imports such a man entirely sober at the time and in full possession of his faculties of observation, attention, and reflection.

The people of the city of Wilmington and the public generally have a paramount right to the use of the public streets and highways of it, but as the defendant, the railroad company, not only has the right conferred but is expressly bound by its charter to provide and maintain a good and sufficient crossing at the intersection mentioned for the use of the public, it was not bound while engaged in relaying and repairing it to suspend any of its business on their railroad or the transit of any of its trains over it in order to complete it in the shortest time and with the least inconvenience to the public possible, provided it was prosecuted with reasonable diligence and dispatch under all the circumstances.

THIS was an action on the case for consequential damages by the plaintiff against the defendant for injuries to his person, his horse, carriage, and harness resulting from an accident in driving over the crossing of the railroad of the company at Fourth Street in the city of Wilmington, and which public crossing and street adjacent to it the company was at the time and had been for two weeks engaged in thoroughly and substantially relaying in the best and most improved method. The declaration alleged that during the progress of the work the company had torn up the entire bed of the public street at its intersection with the railroad, but had laid and maintained in the meanwhile a plank road of much diminished width across the railroad for the public use, and during the night on which the accident occurred had left a box-car standing on a railroad side track in Fourth Street, and so near the plank road as to scare his horse in his attempt to drive over it and cause him to run his carriage off one side of it, break one of the front wheels of it, and to throw him out violently upon the ground, thereby inflicting severe wounds and bruises on his back and other portions of his body, and to run away and break

up his carriage and harness, and greatly impair his previously good and gentle qualities as a carriage horse.

During the examination of the witness it appeared in evidence that the plaintiff was only thrown from his seat against the dasher of the carriage, and was not thrown out of it at all upon the ground.

Gordon, for the defendant, objected that there could be no proof as to personal or bodily injuries sustained by the plaintiff in the accident except as alleged in the declaration, as it was material and described his case as it was stated and presented by him.

The Court sustained the objection and ruled out any further evidence as to the plaintiff's personal injuries.

The other facts in the case will sufficiently appear from charge of the court.

Lore, for the plaintiff, asked the court to charge the jury that when alleged contributory negligence on the part of the plaintiff is relied upon by the defendant to defeat such an action as this, he must have been guilty of only ordinary negligence, *Shear. & Redf. on Neg.*, secs. 29, 30, 31, 32; that leaving the box-car standing on the bed of Fourth Street during the night constituted culpable negligence on the part of the company, it being contrary to an ordinance of the city which he had produced and read and a violation of law. *Shear. & Redf. on Neg.*, sec. 484. The right of the public to a highway is paramount to that of a railroad company for all other purposes than that of transit. *Ogle v. P., W. & B. R. R. Co.*, 3 *Houst.* 313.

The Court, Houston, Judge, charged the jury: That as the only matters in dispute between the counsel in the case were questions of fact for their determination alone on the evidence before them, the court would have been content to leave the case without a remark to their consideration and decision upon the evidence alone had not the counsel for the defendant craved the instruction of the court to the jury on the principles

of law applicable to it as stated by him, and which we do not understand to be denied or objected to by the counsel for the plaintiff.

The entire evidence in the case, and particularly all the material facts involved in it, must now be apparent and familiar to you, as well from your recollection of it as detailed by the witnesses for the respective parties in the suit as by the discussion of it by the learned counsel engaged in trial of it before you, and we shall therefore forbear to refer to it specially, or to attempt to recapitulate the whole of it, or to repeat any portion of it, except as to such facts as appear to be wholly uncontroverted or uncontradicted by the conflicting testimony of the witnesses for the respective parties lest we might fail to fully appreciate the force and effect of it, or to present it with entire accuracy and completeness as it was delivered before you in the language of the witnesses themselves. Save on one point, I believe, material to the maintenance or defense of the action in this case the testimony produced on the part of the plaintiff as to every fact alleged and material to be proved, either in support or in defense of it, seems not only to conflict with but to directly contradict the testimony produced on the part of the defendant. This you doubtless have observed as well as the court, and while it is not our province in this stage of the case to form, and much less to intimate or express, any opinion as to the comparative weight or credibility of such contradictory testimony, and are glad we are relieved of the duty of determining that question, we can the better appreciate the grave responsibility which the law devolves upon the jury alone, and not upon the court of deciding it. Your duty, however, in determining such questions, when considering contradictory testimony is to reconcile it if be possible, but if it is not, then to ascertain to what extent and in what particulars it is irreconcilably inconsistent and contradictory. In estimating the probability of mistake or error on the part of wholly unbiased and impartial witnesses in a case, and in deciding on which side the error or mistake lies, much must depend upon the comparative intelligence and the means and opportunities of knowing the matter of fact in question of the respective witnesses, bearing in mind at the same time that positive is entitled to more weight than negative testimony, where

even the number and their comparative intelligence, means, and opportunities of seeing or knowing it are equal at the time; and with these general rules for your guidance in the difficult task often devolved upon juries in cases of conflicting evidence so contradictory as to admit of no reconciliation or agreement whatever, it will be your duty to give credit to that portion of it which you may consider the best entitled to it, and to find for the party in whose favor the evidence appears to preponderate under all the facts and circumstances proved in the cause.

This is what is technically termed an action on the case by Douglas M. McCoy, the plaintiff, against the Philadelphia, Wilmington and Baltimore Railroad Company, the defendant, to recover damages for injuries sustained by him on the night of the 24th of January, 1878, at the intersection of the railroad of the defendant and Fourth Street in the city of Wilmington, and which he alleges resulted from the negligence of the defendant, and were caused by the servants and employees of the company negligently leaving one of their box-cars standing that night on the track of the railroad where it crosses Fourth Street, in the said city, extending two-thirds of its length into the street, and so close to the contracted and temporary street crossing which the company had there constructed for the passages of horses and vehilces across the track during the progress of certain repairs which they were then doing upon the crossing at its intersection with that street, as to frighten his horse and cause him to shy from the crossing and break and run away with his carriage, in which he was then riding with Mr. Sylvester D. Townsend, a friend and neighbor of his, and both of whom were then proceeding by the way of Fourth Street to their respective residences a short distance out of the city. There were also other acts of negligence of a cumulative character, as well as other injuries alleged and complained of by the plaintiff, as increasing and aggravating the act of negligence just stated and the loss and damage resulting from it to him, but upon the final argument of the case before you by the counsel for the plaintiff they seem to have substantially resolved themselves into two demands simply, the damage which he alleges he has sustained in the injury done to his carriage and

harness, and in the injury done to his horse in his previous good qualities as a safe and gentle carriage horse, and in his permanent depreciation in that respect, as he alleges, and all because of the alleged act of negligence by the servants of the railroad company in leaving the car standing on the track, and the accident which resulted from it to the plaintiff as before stated.

If, after carefully considering and weighing all the evidence produced in the case by both the plaintiff and the defendant and whatever conflict and contradiction which may be found to characterize it, you should believe that the accident and injuries complained of were wholly attributable to the alleged negligence of the servants of the company in leaving the box-car so standing on their railroad track where it intersects or crosses Fourth Street in the city of Wilmington, and without any negligence on the part of the plaintiff having in fact contributed to produce or cause the accident and the consequence of it to him, then your verdict should be in favor of the plaintiff, and for such an amount of damages merely as you shall be satisfied from the proof before you will be sufficient to fully remunerate him for the actual injury done to his horse, carriage, and harness, and no more; for in an action of trespass on the case such as this is for a consequential injury, no exemplary or punitive damages, as they are termed, can be claimed or recovered. We must further say to you, however, on this point of the case, that as there seems to be no dispute about the fact and no contradiction of the testimony that the box-car before mentioned was left standing on the track at that crossing on that occasion from about ten o'clock at night until about five o'clock the next morning, it was not only an act of culpable negligence at common law on the part of the servant or agent of the company who in the usual course of his employment as such servant or agent so placed and left it there, which would render the railroad company liable in an action of this kind for damages for an accident and injury to any one lawfully using the street as a common public highway, wholly resulting from such negligence and without any contributory negligence on his part, as before stated, but it was also expressly prohibited by an ordinance of the city of Wilmington produced and read in evidence

which makes it unlawful for any railroad company to leave any engine, train, or car stationary on any railroad track owned or used by it where it is crossed by any street of the city for a longer time than ten minutes, except in case of an accident; and although the right to bring and maintain this action is not derived from the ordinance, the right and authority of the municipal corporation of the city to prescribe such a regulation with reference to its streets is derived from the same source of power and authority which conferred its charter with all its rights and powers in this State on the railroad company, the legislature of the State, and by competent authority the city ordinance made the act of leaving the car standing there for a longer time than ten minutes under the circumstances unlawful as well as culpably negligent at common law.

But to this action and demand of the plaintiff for damages by reason of this alleged negligence on the part of the defendant, the latter alleges and sets up as a legal defense to it that the defendant did by his own negligence and indiscretion and lack of ordinary and proper care and prudence on that occasion, by driving down Fourth Street and over the crossing at such an hour of the night and in the condition in which he then well knew it to be, contributed to the occurrence of the accident, and **was** therefore in fault and chargeable with negligence in respect to the cause of it as well as the company, and if so, that he was not entitled to recover in the action, because, as the counsel for the defendant contends, it must be shown to the satisfaction of the jury that the negligence of the defendant was not only the cause but the whole and sole cause of the accident and injury which befell the plaintiff on the occasion in question, without any default or negligence, or want of ordinary care, caution, and prudence on his part to prevent or avoid the danger of such an accident at the time and under the circumstances proved which contributed in any degree to occasion it, to entitle him in law to maintain the action. And such we say to you is the well-settled principle of law applicable in all cases of this kind, when such contributory negligence on the part of the plaintiff is also proved to the satisfaction of the jury. But whether or not there was any such contributory negligence o_n

the part of plaintiff in this case was a question of fact, on which, of course, we express or intimate no opinion, as it was solely for the consideration and decision of the jury from all the evidence which they had before them on that point and which must still be fresh and distinct in their recollection. The testimony for the plaintiff and that for the defendant upon that point was conflicting and contradictory as to the state and condition in which the plaintiff and his friend and companion, Mr. Townsend, left the raffle and convivial entertainment at Mealy's saloon, about half past eleven o'clock that night, and as to the allegation of the defendant that they were then fuddled and so much under the influence and effect of intoxicating liquor when they were driving over the crossing as to be incapable of exercising that degree of care, caution, and prudence which the law requires of every man in such an attempt or undertaking to exercise in order to avoid and escape the danger of such a casualty or accident. The condition of the crossing at the time, the thorough work of repairing and relaying it with stone in which the servants of the company had then been engaged for about two weeks, and the temporary passages provided by them in the meanwhile for horses and carriages and vehicles of all kind by day and night over the tracks of the railroad and the crossing of it on Fourth Street, had been fully described and were in evidence before the jury, and from which it would appear to them what was the danger and what was the kind of care and prudence required of the plaintiff to drive over it with safety at that time, provided the jury should be satisfied from the evidence in the case that the accident was caused, so far as the railroad company was concerned, by the negligence of its servants in leaving the box-car standing on the track and the crossing in the position before described and more fully explained to you in the testimony of the witnesses who were examined particularly as to that fact. The rule of law in such cases has been correctly stated by the counsel for the plaintiff, and required only ordinary care, and not extreme or extraordinary care on the part of the plaintiff, to avoid such an accident from the car standing on the track and so close to the temporary crossing of only twenty feet in width along and

upon which he was then driving, but the authority which he has cited in its support of it informs us that ordinary care in such a case implies the use of such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. If the danger is remote or slight, the care required to avoid it may be slight. If the danger is near and extraordinary, extraordinary care and vigilance should be used to avoid it, because such would be the natural course of a prudent man. It is likewise further defined, with reference more particularly to cases of contributory negligence, to be that degree of care which persons of ordinary care and prudence are accustomed to use or employ under the same or similar circumstances; as in the case of one who is passing along an obstructed public highway he is bound to observe ordinary, that is to say, such care as a reasonably prudent man under the peculiar circumstances of the case would exercise, to preserve himself and his property from injury; and this, of course, imports such a man entirely sober at the time, and in full possession of his faculties of observation, attention, and reflection.

If, therefore, the jury should be satisfied from the evidence that the plaintiff for any cause or reason failed or neglected to exercise such care and prudence as we have just defined and described to avoid the danger and preserve himself and his horse and carriage from the accident and injuries in question, and by such negligence contributed in any degree with the negligence of the defendant or its servants in causing them, he is not entitled to recover for the injuries occasioned by it, and the verdict of the jury should be for the defendant; because as the law has no means, if such was the case, of ascertaining the comparative degree or amount of such contributory negligence, it cannot and will not undertake to measure it, or the relative degree of culpability or negligence of the respective parties in the case, but denies relief where the parties are both in fault and the negligence is mutual, although it may not be equal as between them.

The defendant further alleges in defense of the action that the plaintiff's horse was in a run down Fourth Street when he

reached the crossing, and that his carriage was broken before he reached that part of the crossing where the car was standing, in support of which the testimony of Stewart, the flagman and night watchman stationed at the crossing, was direct and positive, and was apparently corroborated (but to what extent it will be for the jury to consider and determine from the evidence before them in regard to that matter) by the testimony of Mahan, the hackman, while it is directly and as positively denied and contradicted by the testimony of Sylvester D. Townsend, who was riding in the carriage at the time with the plaintiff, and who in turn is apparently although indirectly corroborated (but to what extent it will likewise be for the jury to consider and determine) by the testimony of the witness, Enoch Moore, who examined the next morning the tracks of the carriage and the hub of the broken wheel of it over the crossing, as he said, is also evidence to the contrary, and all of which, as well as that of other witnesses touching the matter, the jury will doubtless remember with more accuracy than we could repeat it if we were to attempt to do so. But relying on the recollection of the jury of all the testimony on both sides on that point, we further say to you that if you should be satisfied from it that the horse of the plaintiff was in a run, either with or without his ability to hold him when he reached the crossing and the car standing on the railroad track near it, then the accident and the injuries done to the horse and carriage of the plaintiff on that occasion could not have resulted solely from the negligence of the defendant's servants in leaving the car standing there, and whether the running of the horse in that case was voluntary or involuntary on the part of the plaintiff he would not be entitled in law to recover in this action; because, if the running was voluntary on his part it was the greatest kind of imprudence to approach the crossing at that speed, and if it was involuntary on his part then it was an accident for which the defendant was in no manner responsible, which must in the first place have contributed in no small degree to the accident complained of and which so soon after followed it, if it was not the sole cause of it.

If, on the contrary, however, the jury should be satisfied, after carefully considering and weighing all the evidence and the

conflict and contradiction which characterizes so much of the material portions of it, that the plaintiff was not chargeable with any contributory negligence in the case such as the law contemplates and we have before defined, but that it was alone and solely attributable to the negligence of the servants of the defendant in leaving the box-car standing on the crossing in the position before mentioned, then the verdict of the jury should be in favor of the plaintiff for the amount of the injury and damage done to his horse and carriage by reason of it.

But as the counsel for the plaintiff has asked us to charge you as to the relative rights of the public in general and the railroad company to the use and enjoyment of the street in question and the crossing of its railroad at its intersection with it, we will say to you that as Fourth Street was then, and long had been before the company was chartered or the railroad was constructed by it, a common highway established and maintained at the expense of the city of Wilmington, there can be no question in this case that the people of the city and the public in general had a paramount right to the use and enjoyment of it as such, as well where it is intersected and crossed by the railroad as in any other part of it. But at the same time the railroad company not only has the right conferred but is expressly bound by its charter to provide and maintain at its expense a good and proper crossing over the railroad at the intersection mentioned for the convenience of the public so using and enjoying the street as a common highway; and as it was for the manifest benefit and advantage of all concerned, both the public and railroad company, that the work of repairing or reconstructing the crossing whenever necessary or expedient should be done in the best and in the most substantial and durable manner, the company was not bound to suspend any of its business or the transit of any of its trains in the transportation of passengers or property over its railroad in order to perform and complete the work in the shortest time and with as little delay and inconvenience to the public as possible, provided it was prosecuted with reasonable dispatch and diligence, and with as little inconvenience, obstruction, and danger to the public in the use of the street and crossing as was practicable under the circumstances.

The plaintiff had a verdict for six cents damages.

INDEX.

ACCEPTANCE.

A verbal acceptance of a written order for the payment of money, and promise to pay it without seeing it produced, will bind the acceptor in preference to a *fi. fa.* attachment subsequently laid in his hands for the same amount at the suit of an execution creditor. *Bancroft & Co. v. Denny*, 9.

ACKNOWLEDGMENT. See RESULTING TRUST, 6.

ACTION. See CONTRACT, 7; PROMISSORY NOTE, 4; CORPORATION, 1, 2, 3.

ACT OF LIMITATIONS. See LIMITATION OF ACTIONS.

ADMINISTRATORS. See CORPORATIONS, 2, 3.

ADVERSE POSSESSION. See EJECTMENT, 4, 5.

ADVERTISEMENT. See JUDICIAL SALES, 1, 2, 9, 10.

AFFIDAVIT OF CAUSE OF ACTION AND OF DEFENSE.

1. On affidavit and copy of the cause of action filed judgment given, notwithstanding the affidavit of defense filed alleged that the promissory note which was the cause of action was given by the defendant to the plaintiffs for goods sold and delivered, and by mistake the amount of it was in excess of the value of the goods, and he has paid them in full for the actual value of them. *Cooch & Co. v. Money*, 177.

2. In an action of *scire facias* on a mortgage the transcript of the mortgage and the affidavit of the cause of action must be filed together at the same time by the plaintiff, or he will not be entitled to a judgment at the first term for want of an affidavit of defense. *Parker v. Moleston*, 433.

3. Only such instruments of writing for the payment of money as are for the payment of money simply and for nothing more are included in the statute which provides for the recovery of judgment at the first term, on copy of the cause of action filed by the plaintiff with his affidavit that he believes it to be justly and truly due, without an affidavit by the defendant that he has a legal defense to the same or a part thereof, etc. *Tweed v. Dayett*, 526.

See PROMISSORY NOTE, 3, 10.

AGENT.

Agency may be inferred from circumstances and the conduct of the parties between whom the relation of principal and agent is alleged to subsist in the business, and if A becomes the purchaser of the stock in trade of B at sheriff's sale, but without removing the goods, and B remains in possession of them and continues the business as agent, but without disclosing

AGENT.—*Continued*

the name of his principal, the jury will be warranted in presuming that A is his principal in it. *Hansell & Sons v. Levy*, 407.

See **CONDITIONAL SALE**, 3, 4; **CORPORATIONS**, 5; **RAILROAD CORPORATION**, 4.

AGREEMENT.

If the president of an incorporated company which has no seal executes articles of agreement as president of it, under his hand and a common scroll for a seal, it will neither be his own individual covenant, nor the covenant of the company. *McCaulley v. Jenney*, 32.

AMENDMENT.

After argument on a general demurrer in the trial of a *scire facias* under the mechanics' lien law, the court refused the application of the plaintiff for a continuance of the case with leave to amend so as to substitute an action of *assumpsit* at common law in lieu of the *scire facias* under the statute in the case, and gave judgment for the defendant on the demurrer. *Wood & Co. v. Wil. Conf. Academy*, 513.

APPEAL FROM JUSTICE OF THE PEACE.

The court will not dismiss an appeal for want of form as prescribed by the statute, because the condition of the surety in it was "that the said appeal shall be prosecuted with effect, and that any judgment which shall be rendered against the said defendant or his executors or administrators upon said judgment shall be satisfied," instead of "and that any judgment rendered against the said David Miller, his executors or administrators, upon said appeal shall be satisfied." *Miller v. Holding*, 494.

APPEAL FROM REGISTER OF WILLS. See **WILL**, 1.**APPRAISEMENT.** See **INVENTORY AND APPRAISEMENT**.**ATTACHMENT FI. FA.** See **ACCEPTANCE**.**ATTACHMENT FOR RENT.** See **LANDLORD AND TENANT**, 3, 9, 12.**ATTORNEY AT LAW.** See **WITNESS**, 2, 3.**AUTHENTICATION.**

In the authentication of the copy of a deed for a farm in another State, under the act of Congress, the certificate of the presiding judge of the county subscribed to that of the clerk of the county who furnishes the copy with his seal of office affixed to it, should state unequivocally, in effect at least, that the certificate of such clerk is in due form and by the proper officer, as required by the words of the act; and therefore his statement merely that the copy is duly and properly authenticated in due form of law is not sufficient to make it evidence under the act. *Hollister v. Armstrong*, 46.

BAIL.

The statute in relation to the writ has not dispensed with the necessity of a *ca. sa.* and a return of *non est inventus* thereon before the commencement of an action of debt, on a recognizance of bail taken in an action of trespass *quare clausem fregit*. *Layton and wife v. Houston*, 574.

BILL OF EXCHANGE. See ACCEPTANCE; CONTRACT, 4.

BILL OF PARTICULARS. See PLEA OF SET OFF.

CAPIAS AD SATISFACIENDUM. See BAIL.

CERTIORARI.

1. When the record states that both parties appeared on the first day for trial, and that the case was continued on the application of the defendant, and that on the second day, the plaintiff being absent, it was continued again without stating on whose application or any reason therefor, the court will presume that it was done by the justice of his own motion to afford a fair opportunity for the trial of the case. *Wolcott v. Shaw*, 25.

2. The record of a judgment rendered by default on a summons returnable forthwith for want of appearance should state that it was made returnable forthwith, because the justice was satisfied by the oath of the plaintiff or otherwise, that there was danger of his losing the benefit of his process by delay. *Gray v. Vandyke*, 134.

3. The words, "the said constable," contained in the statement of the cause of action, will supply the omission to state that he was a constable in the entry of the names of the parties on the margin of the docket in a suit by a constable against a purchaser for goods sold at an official sale by him. *Luff v. Thomas*, 399.

4. In exceptions to a judgment by default, it will be sufficient if the summons alone shows that a specified hour was fixed in it for the appearance of the defendant, and that the judgment was rendered at that hour. The entry, "October 27th, Dfdt. not appearing, and now to wit, after hearing the allegation and proof, judgment is hereby given by default," etc., is also sufficient. *Wilson v. Greenwood*, 519.

5. In an action for damages for cutting the belt of a wheat-thresher and loss of time in the use of said wheat machine, before a justice of the peace, the judgment for the plaintiff was reversed because it appeared to have been given mainly if not solely for the consequential injury alleged. *Guenford and Hayes v. Loose*, 596.

See WRIT OF RESTITUTION, 1, 2.

CHESAPEAKE AND DELAWARE CANAL. See COLLISION.

CITY OF WILMINGTON. See WILMINGTON.

COLLISION:

The owners of a steam-tug who have the exclusive right and privilege by agreement with the canal company of towing vessels and canal-boats or barges by steam-tugs or by mules or horses, on the Chesapeake and Delaware Canal, with a number of barges in tow in a single line astern of it in the canal, are liable to the owner of a cargo of Indian corn on board a sloop at the same time being towed by them with mules through it in the opposite direction, for a collision of one of the barges with it, by which it was sunk and the corn greatly damaged, if the evidence shows a want of special care, diligence, and skill on the part of

COLLISION—Continued.

their commander of the steam-tug on the occasion, and no contributory negligence appears on the part of the commander of the sloop, notwithstanding the evidence also showed that the owners of the barge had their own crew on board of it, whose duty it was to attend to the steering of it and to keep it in the wake of the steam-tug and in the line of the rest of the tow behind her, but not one of whom was above the deck or at the helm of it when the collision occurred. *Brady & Co. v. Jefferson & Son*, 60.

CONDITIONAL SALE OF PERSONAL PROPERTY.

1. Conditional sales of personal property are valid in this State; and where delivery of property is made upon agreement that no title shall pass until payment is made or some thing is done or occurs, no title passes to the party to whom it is delivered until such payment is made or such thing is done or occurs, and he can pass none to his vendee, no matter how ignorant of the contract such vendee may be.

2. If such property consists of machinery and is placed by the purchaser permanently on his land, yet if its identity can be shown to be that of the property bargained for, the conditional vendor on failure of payment can enter on the premises and remove it and repossess himself of it, provided such be the bargain between the parties; and he can recover a reasonable compensation for the use thereof if such also be the bargain.

3. Bargains and sales made by an agent of a manufacturing company within the scope of his authority bind the company, but if a special agency existed by which he was restricted to a certain mode of dealing, it would not bind the purchaser unless it was communicated to him before he erected the machinery on his freehold.

4. Knowledge of any such special agency or conditional bargain and sale of machinery by the company to a purchaser who erects it on lands bound by a mortgage recorded before the machinery went upon the premises, on the part of the mortgagee, cannot affect the lien of his mortgage upon the machinery if it has thereby become a fixture of the premises bound by it, unless it can be shown that the mortgagee agreed that it should be exempted from it, or so conducted himself with respect to the matter as to mislead and deceive the company into the belief that it would not bind it, for in that case he would have been guilty of a fraud, which the law would not tolerate. *Watertown S. E. Co. v. Davis* 192.

CONSTITUTIONAL LAW. See JUDGMENT, 1, 2, 3.

CONTRACT.

1. In a written agreement for the purchase of merchantable ice, to be delivered thereafter, the terms mean such ice as could be sold in the market at the ordinary price prevailing in it when delivered.

2. Where by the terms of the agreement the vendor was to sell and deliver on shipboard at his place of business ten thousand tons of merchantable ice in equal parts during the months of May, June, and July

CONTRACT—Continued.

then next ensuing, properly packed for a voyage from the State of Maine to Wilmington, Delaware, where the purchasers resided, at a price per ton stipulated in the contract, the purchaser must first name the ship and give the vendor notice of his readiness to receive it on board of her at the place of shipment.

3. The purchaser of goods to be delivered in installments and to be paid for as so delivered cannot claim further deliveries without paying for the part which has been delivered, and therefore he cannot require the tender of any more of them by the vendor without doing so.

4. Where a purchaser of goods shipped to him accepts a draft on him by the vendor for the price of them before the ship's arrival with them, and on her arrival receives and retains them, he is bound to pay it, although they may not be merchantable or in accordance with the stipulation in the contract as to quality if they are of any value whatever. *Wallon & James v. Black*. 149.

5. As well in actions for the non-payments of the price of goods sold and delivered under a contract as in actions for goods sold and delivered with warranty or in actions for work and labor done under a contract, the defendant may at his election either avail himself of any breach of the contract by the plaintiff causing damage to him in reduction of the damage claimed and sustained by the plaintiff from any breach of it by him, or he may sue the plaintiff for the same independently, and the former suit and recovery against him will be no bar to the latter unless in the former suit he had availed himself of his right and privilege to prove and claim such damage in reduction of the damage demanded in it by the plaintiff from him. *Tomlinson & Co. v. Quigley*, 168.

6. A book or paper produced in court on notice from the other side, under the statute and the order of the court, proves itself without evidence if there be no subscribing witness to it, or if there be and both parties claim or take title or interest under it; but if the party producing it claims or takes no title or interest under it, and there is a subscribing witness to it, he must be called to prove the execution of it, as in other cases.

7. An action of *indebitatus assumpsit* will lie at the suit of a subscriber to the capital stock of an incorporated manufacturing company, against another who had paid his stock subscription in full, upon the substantial performance by him of a verbal agreement between them that the stock certificate of the former, when made out for him, should be delivered to the latter and held by him as trustee for the company until his subscription for the stock had been paid in full, on his paying in full for the same, notwithstanding they entered into a further agreement, under their hands and seals, that the former would sell and transfer the said certificate and the shares of stock therein mentioned immediately on his ceasing to be an employee of the company to the latter at its par value, and who thereby agreed to buy the same at that rate, and which the latter transferred to the company itself eight days before the former ceased to be an employee of it. But the action would not lie on a part payment of the stock

CONTRACT—*Continued.*

subscription by the former, however large, as it was not a substantial performance of either agreement prevented by the latter; and, besides, it could be of no benefit or advantage to the latter individually, whatever it might have been to the company to which it was paid. *Taylor v. Jackson*, 224.

See RAILROAD CORPORATION, 1, 2, 3, 5; INSURANCE, 5, 6, 7, 8, 9; FRAUD, 1, 2, 3; TENDER.

CONTRIBUTORY NEGLIGENCE. See COLLISION, RAILROAD CORPORATION, 10.

CORPORATIONS.

1. If the president of an incorporated company which has no seal executes articles of agreement as president of it, under his hand and a common scroll for a seal, it will neither be his own individual covenant, nor the covenant of the company. *McCaulley v. Jenney*, 32.

2. By the laws of this State no corporation aggregate, whether incorporated by the legislature of this State or of any other State, can be appointed an administrator in this State, or can sue as an administrator in the courts of this State. *Fidelity I., T. and S. D. Co. v. Niven*, 163.

3. A corporation created and authorized by statute in another State to administer on the estates of deceased persons in that State, having done so, may sue as such administrator in the courts of this State for a debt due the decedent in this State. *Deringer's Admr. v. Deringer's Admr.*, 416.

4. The making of a probate against the estate of a deceased person by the treasurer of an incorporated company appointed administrator of the deceased creditor in another State under an act of incorporation chartering it for such purposes is not warranted by the provisions of our statute in regard to probates. *Ib.* 528.

5. For the transaction of any business of an incorporated company which requires no seal, the company may appoint an agent without the use of its corporate seal, or of any writing even, the same as a natural person may, for such business, and no preceding appointment of the agent by the company for the transaction of it is necessary if it is subsequently sanctioned either directly or indirectly by the company. *Bancroft & Co. v. Wil. Conf. Academy*, 577.

See CONTRACT, 7; INSURANCE; WILMINGTON; RAILROAD CORPORATION.

COSTS. See REPLEVIN, 2.

COVENANT. See AGREEMENT.

CURTESY. See EJECTMENT, 1, 2, 3.

DAMAGES. See CONTRACTS, 5; REPLEVIN, 2, 6; WILMINGTON, 6; RAILROAD CORPORATION, 8.

DEBTS OF TESTATORS. See WILL, 4, 5, 6, 7, 8, 9, 10.

DECEIT.

To recover in an action of deceit the plaintiff must prove that the defendant made a false and fraudulent representation of facts to him, and that he so made it with the intent to deceive him. *Grier v. Dehan*, 401.

See FRAUD.

DEED. See AUTHENTICATION.

DEMISE. See LANDLORD AND TENANT, 11.

DEMURRER. See AMENDMENT; LANDLORD AND TENANT, 1, 2, 3, 4.

DEVISANT VEL NON. See WILL, 1.

DIVORCE. See MARRIED WOMEN, 1.

DOWER.

1. To entitle a widow to dower in intestate lands of her husband, he must have had during their marriage title or right, legal or equitable, thereto in fee simple.

2. If his title or right to such intestate lands constituted a legal estate of inheritance in fee simple in them, then he must also have been seized of them in law or in fact some time at least during their marriage to entitle her to dower. He must, during the time mentioned, have been seized of a legal estate of freehold in possession with a like estate of immediate inheritance in fee simple in remainder or reversion; the freehold and inheritance must be consolidated and have been in the husband *simul et semel* some time, at least, during their marriage to entitle her to dower in them. Nor is she dowerable in contingent or executory legal estates of inheritance in fee simple as to which the husband dies intestate. Therefore, in a devise of lands and tenements to a trustee in trust for the wife of another during her life, and at her death to her lawful issue in fee simple if she should leave any to survive her, but if not, then to her two brothers, their heirs and assigns, forever, one of the brothers died intestate in the lifetime of the *cestui que trust*, and she died without issue surviving her, it was held that it was a devise of the legal estate to him in one undivided half part of them in contingent remainder in fee simple, expectant and dependent on the uncertain and dubious determination of the legal estate devised to the trustee for the life of the *cestui que trust*, and her death without issue surviving her, and as he died before her he was never seized in law or fact, or entitled to the possession of them, and for which reason his widow who survived the *cestui que trust* was not entitled to dower in the moiety of them so devised to him in fee simple. *Bush v. Bush et al.*, 245.

See RECOGNIZANCE, 1, 2.

DRAFT. See ACCEPTANCE; CONTRACT, 4.

EJECTMENT.

1. In ejectment where the defendant claims title to the land for his life as tenant by the courtesy, it is competent to prove the reputation in the family of the mother at the time that the issue was not born alive.

2. The existence of independent, separate life in a child after its birth is a fact to be proved by competent and credible testimony. And the

EJECTMENT—*Continued.*

burden of proving it rests on the defendant who claims title to the land for his life as tenant by the courtesy. There are no legal presumptions in such a case in favor of the evidence of independent, separate life in a newly born child.

3. Respiration or breathing is evidence of such life and existence, but it is not necessary to prove the fact of respiration or breathing from actual observation. There are other indications of it, among which the beating of the heart and the pulsation of the arteries after the separation of the child from the body of the mother may be considered satisfactory evidence of it, because they show the fact that circulation has been established and is maintained and carried on in the body of the child independently of the mother, it then having no connection with her body. *Doe d. Cannon v. Killen*, 14.

4. Whenever in an action of ejectment a claim of right by adverse possession of twenty years or more is set up by the defendant against the clear and undisputed legal title of the plaintiff to the premises, the burden of establishing it to the satisfaction of the jury always rests upon the defendant.

5. In a case of disputed title on such a ground, if the evidence simply be that a mother who held the legal title to the premises in question allowed a son of hers to take possession under a verbal agreement merely to buy them of her and to use, occupy, and enjoy them as his own property for several years and as long as she lived afterward, although she devised them in her will, made in the meantime, to two of her granddaughters, the jury will be warranted in presuming that he had bought them of her, and if so, his possession of the premises had been adverse from the time he had entered into possession of them under the agreement.

6. But if their verbal agreement further stipulated that he was to pay her rent for the premises until he had paid her the price agreed on for them, the relation of landlord and tenant subsisted between them with respect to the premises, and his possession of them was permissive and not adverse, so long as that relation continued between them and until he unequivocally repudiated it; and if that was not done by him twenty years at least before the commencement of the action, the plaintiffs, the devisees under her will, were entitled to recover the premises.

7. The relation of landlord and tenant may be proved by parol or circumstantial as well as by written or direct evidence, and the actual payment of rent by one person and the receipt of it by another has always been considered the strongest kind of evidence to establish that relation between them. *Doe d. Barret et al v. Jefferson*, 477.

EVICITION. See **LANDLORD AND TENANT**, 1.

EVIDENCE.

1. A book or paper produced in court on notice from the other side, under the statute and the order of the court, proves itself without evidence if there be no subscribing witness to it, or if there be and both parties claim or take title or interest under it; but if the party producing it

EVIDENCE—*Continued.*

claims or takes no title or interest under it, and there is a subscribing witness to it, he must be called to prove the execution of it, as in other cases. *Taylor v. Jackson*, 224.

2. The statute of 1859, enabling parties in civil suits to call the adverse party as a witness, does not render competent a party who, although adverse upon the record, is otherwise incompetent as a witness for the party calling him by reason of interest. *Price v. Pennypacker et al.*, 279.

3. In an action of replevin for a mule and a cow, in which the mule but not the cow was replevied and delivered to the plaintiff, who suffered a judgment of *non pros.* by failing to file a declaration in it, on which the defendant took an assignment of the replevin bond, and sued him and recovered judgment upon it, the record of neither action is evidence to support a plea of former recovery in a subsequent action of replevin by the plaintiff against the defendant for the cow only. *Poor v. Darrah*, 394.

4. A statute of Missouri allowing ten per cent. interest, published among the revised statutes of that State in 1865, presumed to be still in force in 1877 in the absence of any evidence to the contrary.

5. And a promissory note bearing ten per cent. interest dated at Westport, Missouri, will be presumed to have been made there in the absence of any evidence to the contrary. *Parks v. Evans*, 576.

EXECUTION. See JUDICIAL SALES; TROVER, 1, 2.

EXEMPLARY DAMAGES. See RAILROAD CORPORATION, 8.

FIXTURE. See CONDITIONAL SALE OF PERSONAL PROPERTY, 4.

FOREIGN ATTACHMENT. See RAILROAD CORPORATION, 6.

FOREIGN CORPORATION. See RAILROAD CORPORATION, 6.

FOREIGN JUDGMENT. See JUDGMENT, 3.

FORMER RECOVERY. See EVIDENCE, 3.

FRAUD.

1. If the purchaser of a horse buys it solely by reason of a false representation of its soundness made to him by the vendor, and which he knew to be false when he made it, the vendor cannot maintain an action for the price of it, for the fraudulent representation would vitiate the sale in that case provided the purchaser gives him notice within a reasonable time after discovering the fraud that he will not complete the bargain by paying the price, and returns or offers to return it in rescission of the contract of purchase.

2. But if the purchaser soon after becomes aware of the fact that the vendor's representation of its soundness is false, yet takes it on his subsequent admission and further representation that it was a little lame, but put on the road it would soon drive off, and which representation the vendor also knew to be false, still he could not maintain the action for the price of it if the purchaser within a reasonable time after discovering that his second representation was also false, notifies him that he will

FRAUD—*Continued.*

not pay the price, and returns or offers to return the horse to him and rescind the contract of sale.

3. As the parties resided in the same county and within fifteen miles of each other, that should have been done by the purchaser the day he discovered the fraud, or at least the next day if possible, to have been done within a reasonable time or as soon as the circumstances of the case would admit. *Wilson v. Fisher*, 395.

4. A purchaser of personal property at a sale made by a public officer of whatever kind under process of law, has the right to enter upon the premises of the defendant in the execution in a peaceable and orderly manner without obtaining any permission from him, and to take and carry them away.

5. If the issue to be tried before the jury be whether the proceedings and acts of the constable in levying upon and selling such property were fraudulent and contrary to the provisions of the act of assembly in such case made and provided, and they should be so found by the jury, and that they were committed with the knowledge and consent of the plaintiff in the process, who purchased them, then he will be liable to the defendant in it in an action of trespass *quare clausem fregit* for entering his premises and taking and carrying away the personal property purchased by him under such process in damages to the value of it.

6. To constitute fraud on the part of a public officer in the execution of legal process it must be shown that he designedly and wilfully acted with respect to the defendant in such a covenant, deceitful, treacherous, and dishonest manner as to deprive him of some right or benefit to which he was entitled or subject him to some damage or injury; and if done with the knowledge and consent of the plaintiff in the process, it would be fraudulent in both of them, and in either case the sale would be treated in the tribunal out of which the process issued as utterly void, and the plaintiff would not be allowed to derive any benefit from it. So also, if a mere purchaser at such a sale should conspire with the officer to commit the fraud, he could not be allowed to retain any property bought by him at such fraudulent sale.

7. But although the doings of an officer with or under his process may be irregular, yet, if they are honest, they are so far valid as not to affect the rights of parties taking title under him. Because in that case the validity of the sale cannot be collaterally controverted or inquired into in a proceeding before another tribunal; and in case of a sale by a constable voidable for a mistake or irregularity committed by either the justice or the constable, it is to be objected to before the justice who issued the process on the return of it. *Russell v. Stoeckel*, 464.

8. The defendant in a *levari facias* on a mortgage became the purchaser of the premises at the sale, but failed to comply at the return of the writ, and the day before the sale of them on the *alias lev. fa.* leased them to his mother for a year and was paid the whole rent in advance; the plaintiff in the writ then became the purchaser of them without any notice or

FRAUD—Continued.

knowledge of the lease. It was held to be a fraudulent artifice that would not prevent the issuing of a writ at the return term to put the purchaser in possession of the premises. *The Smyrna B. L. A. v. Worden*, 508.

See DECEIT. CONDITIONAL SALE, 4; RESULTING TRUST, 3; PROMISORY NOTE, 4, 7; RAILROAD CORPORATION, 1, 2, 3, 4; REPLEVIN, 7.

GUARDIAN BOND.

1. A judgment rendered by a justice of the peace on a cause of action of which he has no jurisdiction cannot be pleaded in bar to a suit on the same cause of action between the same parties afterward brought in the Superior Court. Nor is it necessary that it should be reversed before the suit is commenced in this court.

2. Such a judgment is a nullity and the maxim *nemo debet bis vexari pro eadem casua* does not apply to another suit on the same cause of action in a court having competent jurisdiction of it.

3. No action will lie on a guardian bond before a justice of the peace. *Green v. Clawson*, 159.

HABERE FACIAS POSSESSIONEM. See WRIT OF POSSESSION.

HUSBAND AND WIFE. See EJECTMENT, 1, 2, 3; MARRIED WOMEN, 1, 2, 3; DOWER, 1, 2.

IMPROVEMENTS. See JUDICIAL SALES, 9, 10.

INSURANCE.

1. A special plea in an action on a policy of insurance that the plaintiffs permitted the building insured to be used for purposes which increased the risk of loss by fire, without stating what such purposes were, is deficient in particularity and demurrable.

2. Since the repeal of the stamp acts of Congress deeds executed and delivered while they were in force, but without any United States internal revenue stamp upon them, must be recorded by the recorder of deeds for the county if tendered for that purpose, and there is no other objection to recording them.

3. If neither the attorneys nor the members of the court are agreed as to what a witness said as to a material fact in the trial of a case, the court will leave it to the jury and decline to nonsuit the plaintiff for the want of sufficient proof as to the fact to which his statement referred.

4. If at the time of the application and issuing of the policy the insured is in possession of the whole of the property as the lawful and rightful owner of it, and in his application represents himself to be the owner of the whole of it, the court will not nonsuit him in an action on the policy for the loss of it by fire, although it appears from the evidence that he had never had a deed but for one moiety of it, and that without any United States revenue stamp upon it as then required by the act of Congress up to the time of filing his application, and the granting of the policy, either on the ground of misrepresentation in the application as to his ownership of the whole of the property, or on the ground that he had not then the legal title to any part of it.

INSURANCE—Continued.

5. The charter of a mutual fire insurance company provided that in case of an injury or loss by fire the insured should give immediate notice of it to the president or secretary at the office of the company, and that the company should be liable to a suit for any loss if it should not be paid within ninety days after notification of such loss. The plaintiffs in the case gave notice of the loss to the president at the office of the company in four days after the fire and required the payment of the amount of the insurance by letter, and the secretary by the direction of the president replied to their letter declining to pay it. *Held*, that it was due notification of the loss, and that the reply of the president through the letter of the secretary was a refusal to pay it, which amounted to a waiver by the company of its exemption from liability to be sued for it under the charter until ninety days after the notification of the loss.

6. The insurance on a stock of goods in a building after their removal from it may be transferred to the building by the secretary, with the knowledge and consent of the company express or implied, on the request of the insured, by a written indorsement under his hand on the face and in the body of the policy and above the signature of the president and the seal of the company after its execution and delivery, and without any alteration to the same effect being made in the written application of the insured on which the policy was issued. And such transfer of the insurance will not vary or affect the terms of the policy or the application in any respect beyond the mere fact of transferring the insurance from the goods to the building. And the extent and measure of the risk assumed by the company on the transfer being made was the measure and extent of the risk which it incurred in respect to the stock of goods originally insured, and is to be measured by the use or uses to which the building was originally appropriated under the policy, that is to say, the rate and degree of risk incident to a woolen factory in which wool and woolen goods are kept and manufactured in such a building as described in the application and policy.

7. In every contract or policy of insurance against fire there is an implied promise on the part of the insured that he will not after it is made alter or change the insured premises, or alter or change the business then carried on, or to be carried on there, so as to increase the risk of loss by fire. And this is the rule of law, although there be no by-law or the company on the subject. And if the insured or his tenants so occupy or use the property insured at any time as to increase the risk of injury to, or loss of it by fire, the insured is not entitled to recover for it.

8. The application for the insurance, and on which the policy is issued, enters into and constitutes part and parcel of the contract of insurance, and is made such by the express terms of the policy itself; and from the application and policy must be ascertained and determined the degree or extent of risk which the company assumes and agrees to insure against.

9. The origin of the fire or how it may have occurred is wholly immaterial, and is not a question to be considered in the case. If the insured or

INSURANCE—*Continued.*

his tenants increase the risk of injury or loss to the insured premises from fire by any other use or uses to which it was at any time appropriated after the transfer of the insurance from the stock of wool, woolen goods, and materials which have before been removed from the building to the building itself, the contract of insurance is vitiated and avoided by it, and no action can be maintained upon it. *Hoffecker & Bro. v. N. C. C. M. In. Co.*, 101.

INTESTATE ESTATES. See **RECOGNIZANCE**, 1, 2; **DOWER**, 1, 2,

INVENTORY AND APPRAISEMENT. See **JUDICIAL SALES**, 7, 8; **TROVER**, 1, 2.

ISSUE BORN ALIVE. See **EJECTMENT**, 1, 2, 3.

ISSUE ON JUDGMENT.

1. Upon the trial of an issue to ascertain and determine by the verdict of a jury if any and what amount is due on a judgment of several years standing where both of the parties are dead, and entered on a judgment bond and warrant of attorney by the administrators of the plaintiff five years after his death, a due bill given by him to the defendant for a sum of money subsequent to the date of the bond may be given in evidence against the judgment; but not that a deed was made on the same day as the bond by the plaintiff and wife for a lot of ground to the defendant to be followed up by proof that it was given for the consideration of the deed and that the defendant soon after built a dwelling-house upon it which increased the value of it very much, but long afterward discovered that it was bound by a mortgage executed by Temple and wife to another person before the sale of it to him, and that the premises had since and very recently been sold on it at sheriff's sale to pay the mortgage, was not admissible evidence in such a case.

2. The presumption of payment from lapse of time is to be calculated from the entry of the judgment, and not from the date of the bond and warrant of attorney on which it is entered, but when it applies to the bond it will be too late to enter the judgment under the warrant of attorney executed at the same time with it. *Cloud's Admr. v. Temple's Admrs.*, 587.

JOINT AND SEVERAL. See **PROMISSORY NOTE**, 4.

JUDGMENT.

1. Whatever may have been at one time the impression to the contrary, it is now well and definitely settled that to render a judgment recovered in the courts of one State final and conclusive in the courts of another under the provisions of the Constitution of the United States and the act of Congress on the subject, the court in which it was recovered must have had jurisdiction of the subject-matter of the suit, or the cause of action, and of the parties to it, and particularly of the defendants, and when it assumes the character of an action or proceeding *in rem*, that it had jurisdiction of the *res* or the thing itself; for in each of these respects the jurisdiction of the court rendering the judgment may be contradicted, inquired into, and disproved in the courts of another State, notwithstanding

JUDGMENT—*Continued.*

ing the provisions of the constitution and the act of Congress in relation to the matter.

2. Nor will a judgment recovered in a court of another State, by the record of which it appeared that the defendants in it resided at the time out of the State and had never been served with process in the suit, nor voluntarily appeared to it, be considered by the courts in this State to constitute at common law sufficient *prima facie* evidence of a legal indebtedness on the part of the defendants to the plaintiffs in it, to entitle the latter to recover here upon it in an action of debt, or in an action of *indebitantus assumpsit* on the judgment, independent of the provisions of the constitution and the act of Congress before referred to.

3. By the common law of England and this country, a judgment of a court of law of competent jurisdiction recovered in a foreign country only imposes in the contemplation of it a legal obligation on the defendant to pay the plaintiff in it the sum so adjudicated to be due by it, on which an action of debt to enforce the judgment in their courts or our courts may be maintained at common law. But even in such an action at common law on a purely foreign judgment, if it appears by the record of it or it is proved on the trial that the defendant was not served with process in the foreign suit, or did not appear to it either voluntarily or otherwise, or that the foreign tribunal which rendered it had not jurisdiction of the subject-matter of the suit or the cause of action, it is held to impose no legal obligation on the defendant to pay the judgment, and no action can be maintained at common law for it; and the jurisdiction of the foreign court which rendered the judgment in either of these respects may also be impeached and denied, inquired into and disproved, by evidence at the trial in any such action at common law upon it. *Mitchell, Vance & Co. v. Ferris & Co.*, 34.

4. A judgment rendered by a justice of the peace on a cause of action of which he has no jurisdiction cannot be pleaded in bar to a suit on the same cause of action between the same parties afterward brought in the Superior Court. Nor is it necessary that it should be reversed before the suit is commenced in this court.

5. Such a judgment is a nullity and the maxim *nemo debet bis vexari pro eadem causa* does not apply to another suit on the same cause of action in a court having competent jurisdiction of it.

6. No action will lie on a guardian bond before a justice of the peace. *Green v. Clawson*, 159.

See JUDICIAL SALES, 6, 9; EVIDENCE, 3; AFFIDAVIT, ETC., 1, 2, 3; REPLEVIN, 7; USURY; APPEAL FROM JUSTICE OF THE PEACE; RECOGNIZANCE, 1, 2; ONUS PROBANDI; ISSUE ON JUDGMENT, 1, 2.

JUDICIAL SALES.

1. In a sale of land by the sheriff on execution process, an advertisement of the sale must be delivered ten days at least before the day of sale to each plaintiff in the execution, and also to each plaintiff in any other

JUDICIAL SALES—*Continued.*

execution or executions at the time in the hands of the sheriff. *Clements v. Williamson, late Sheriff*, 25.

2. In advertising the sale of lands on a mortgage it has long been the well settled practice, and uniformly recognized by our courts, for the sheriffs in this State to follow the description of the lands contained in the mortgage. *Beck v. The Bank of Smyrna*, 120.

3. Where a landlord buys in the unexpired term of his tenant at sheriff's sale of his goods and chattels taken in execution at the suit of another on the demised premises under a rent of money at the close of the first quarter of the rental year, and receives from the sheriff out of the proceeds of sale the whole amount of the year's rent then growing due, the provision of the statute will apply to the case and he will be entitled to the whole of the rent for the one year so paid, and not merely to the first quarter of it due at the time of the sheriff's sale of the unexpired term of the tenant in them.

4. The principle ruled in *Gause v. Richardson*, 4 *Houst.* 222, must be confined to the particular facts of that case.

5. In such a case if there be two landlords and the sale of the unexpired term of the lease be returned by the sheriff as having been made to one of them, it may be proved that it was in fact made to him for and on account of both of them. *McIntire v. Barkley*, 145.

6. The lands of a defendant in a judgment cannot be seized and sold by the sheriff on a *fi. fa.*, even under a waiver by the defendant of the seizure and sale of his personal property and inquisition, without a writ of *venditioni exponas*, at least, for that purpose. *Cloud v. Lore*, 163.

7. In an action of trover by a sheriff against a tort-feasor for the taking and conversion of goods levied on by him under an execution in his hands, and on which he afterward by mistake returned the goods as sold by him, his return may be contradicted by him, and he is not estopped or concluded by it from proving the taking and conversion of the goods. For his return to the writ in such a case as a matter of record in the court does not import absolute verity, but is only *prima facie* true and may be contradicted.

8. The usual inventory and appraisement made by a sheriff in levying a *fi. fa.* execution on goods and chattels constitutes such a constructive seizure and possession of them by him as sheriff from that time, and before any appraisement has been made of them by two sworn appraisers afterward, as to give him such a special property in them as will enable him to maintain an action of trover against a tort-feasor for the tortious taking and conversion of them between that time and the appraisement of them made afterward by the two sworn appraisers. Or, in other words, that the inventory and appraisement of them made by the sheriff in the first instance constitutes a sufficient levy on them when there has been no actual seizure of them by him to give him such a special property in them before the appraisement of them by the two sworn appraisers afterward *Hargadine, Sheriff, v. Ford*, 380.

JUDICIAL SALES—*Continued.*

9. The statute of February 1st, 1877, requires that the advertisement of a sale of lands and tenements by a sheriff under a *levari facias* on a mortgage should specify the principal improvements thereon, as much so as it requires it in a sale of lands and tenements under a judgment or other execution process. *Karsner v. Bailey et al.*, 405.

10. A sheriff's sale set aside for failure to notice or mention in his advertisement of the sale and description of the land a large and good barn as one of the principal improvements on the premises. Also for gross inadequacy of price. *Oldham v. Hossenger*, 434.

11. A sheriff's sale of land for seventeen thousand five hundred dollars set aside on proof that it was worth from twenty-five thousand to thirty thousand dollars, and that a gentleman of means was at the sale prepared to bid twenty-five thousand dollars for it, but owing to his deafness and inability to hear the bidding and the failure of his agent to pursue his instructions on the occasion, it was struck off for the sum stated. *Broomall v. Reybold and wife*, 435.

12. A purchaser of personal property at a sale made by a public officer of whatever kind under process of law, has the right to enter upon the premises of the defendant in the execution in a peaceable and orderly manner without obtaining any permission from him, and to take and carry them away. *Russell v. Stoeckel*, 464.

See FRAUD, 8; RECOGNIZANCE, 1, 2; REPLEVIN, 7; WRIT OF POSSESSION, 1, 2.

JUNCTION AND BREAKWATER R. R. COMPANY.

Under the act of assembly to loan the J. & B. R. R. Co. the bonds of the State to the amount of four hundred thousand dollars on the mortgage of the company for that amount, and the amendment and the supplement thereto, the mortgage to be without interest for two years from its date, and forty-eight thousand dollars of the bonds to be retained and sold by the State treasurer to pay the interest for the two years, but which were not sold, he having paid the same out of the current revenue of the State, *held* by the court that the State was not entitled under the acts of assembly referred to, to interest on the mortgage for the first two years, as the bonds retained for that purpose had not been sold by the State treasurer. *J. & B. R. R. Co. v. Davis*, 90.

JURISDICTION. See JUDGMENT, 1, 2, 3; PLEADING, 2, 3, 4; WRIT OF RESTITUTION, 1, 2.

KNIGHTS OF PYTHIAS.

An action at law will lie against a lodge of the Knights of Pythias for benefits due to a member of it at his death, who had paid his dues to it up to that time. *Magee, Admr., v. Clayton Lodge*, 453.

LANDS, SALE OF. See JUDICIAL SALES, 1, 2, 6, 9, 10, 11; RECOGNIZANCE, 1, 2.

LANDLORD AND TENANT.

1. A general demurrer to a count in a declaration in an action on the case alleging that the defendant, being the owner of a certain messuage with the premises, demised the same to the plaintiff for one year, with the exception of three rooms in it, which he retained for his own use and occupation, in pursuance of which the plaintiff with his family entered into possession thereof and continued to occupy the same for three months, but that from the time of his so entering into possession of them up to the time last mentioned he and his family and persons visiting them had been so much annoyed and disturbed by gaming, unseemly sports, uncouth noises, profane and obscene expressions in the portion of the house reserved and occupied by the defendant, often continued and kept up until a late hour of the night, that he was constrained and obliged to remove therefrom with his family at the time last mentioned, and was thereby subjected to great trouble, inconvenience, and expense in removing his family and furniture therefrom, and in procuring and renting another house, admits all the material facts alleged in the count, which as thus alleged in the count and admitted by the demurrer constitute in law a case of constructive eviction of the plaintiff from the demised premises, as the result of the wrongful acts and conduct of the defendant, and *prima facie* import an indirect injury for which the action on the case will lie.

2. The facts alleged in other counts and also admitted by the demurrer, that the plaintiff could and would have sublet the demised premises for the same rent he was to pay for the residue of the term but for the wrongful acts and prevention of it by the defendant in the manner stated in them, likewise import in law an indirect injury to the plaintiff by the defendant for which an action on the case will lie.

3. Under the proceedings had, as alleged in them, by the defendant against the plaintiff to recover the rent, and by which he recovered the rent for the whole year, there was no way in which the plaintiff could avail himself of these matters as a defense against it except on the return of the attachment to this court; but the fact that he did not then attempt to avail himself of any of the matters of fact alleged in any of the counts in the narr, and particularly, as alleged in the first count, as a defense against the defendant's demand for rent for the residue of the term after the plaintiff's wrongful eviction by him from the demised premises, will not bar his right to maintain this action.

4. The ground of action on which the last count is based is an alleged false and malicious proceeding by the defendant without probable cause or good grounds to believe that the plaintiff intended to remove his effects from the county, or otherwise to dispose of the same, and would so remove or dispose of them before the rent would become due, so as to defeat a distress for it under the provisions of the statute for attachment and security of rent in such a case; but notwithstanding the matters of fact alleged in it was a resort to legal process and was *prima facie* for a lawful and proper purpose, yet if the material allegations of the plaintiff in this

LANDLORD AND TENANT—*Continued.*

count be admitted, as they also were by the general demurrer to it as well as to all the other counts, it was upon the principle which lies at the foundation of all actions for malicious suits and prosecutions without probable cause and malicious, viz., a malicious abuse and perversion of the process and proceeding provided for in the statute for which this action will lie. *Rowbotham v. Pearce*, 135.

5. Where a landlord buys in the unexpired term of his tenant at sheriff's sale of his goods and chattels taken in execution at the suit of another on the demised premises under a rent of money at the close of the first quarter of the rental year, and receives from the sheriff out of the proceeds of sale the whole amount of the year's rent then growing due, the provision of the statute will apply to the case and he will be entitled to the whole of the rent for the one year so paid, and not merely to the first quarter of it due at the time of the sheriff's sale of the unexpired term of the tenant in them.

6. The principle ruled in *Gause v. Richardson*, 4 *Houst.* 222, must be confined to the particular facts of that case.

7. In such a case if there be two landlords and the sale of the unexpired term of the lease be returned by the sheriff as having been made to one of them, it may be proved that it was in fact made to him for and on account of both of them. *McIntire v. Barkley*, 145.

8. Neither the raw material furnished by another to the tenant of a woolen factory to be woven into flannel for him at a stipulated price per yard nor the fabric when made, on the demised premises, are subject to distress for rent due the landlord and in arrears for the past year, or to the landlord's attachment for the rent growing due the current year; but they both have a preference as to other goods on the premises belonging to the tenant over attachments against him for wages due the hands employed in the factory.

9. In an action of replevin each party may be an actor. If the goods have been replevied and the plaintiff prevails in it he is entitled to nominal damages, and also his costs; but if the defendant prevails in it he is entitled to a return of the goods or to damages to the value of them and also his costs. If a verdict be found that a part of the goods replevied were the property of the plaintiff and a part were not, each party must be considered as prevailing to that extent respectively, and the verdict must so be in favor of each of them respectively; and as each party has judgment upon it for his damages, either nominal or substantial, he is so far a prevailing party and must also have his costs. *Knowles v. Pierce*, 178.

10. The renting of premises by an agreement in writing, but not under seal, for a term of five years, is effectual only as a demise for one year, but if continued without notice from either party to terminate the holding for the five years it becomes in effect a parol demise from year to year during the holding, and in *assumpsit* on the agreement by the landlord against the tenant for not repairing the premises in the meanwhile, each parol demise

LANDLORD AND TENANT—Continued.

from year to year becomes a distinct and complete cause of action, and will be barred after three years by the statute of limitations. *Stewart v. Apel*, 189.

11. There is no qualification or distinction between a resident and a non-resident landlord in the provision of the statute which requires the tenant where the demise is for one or more years to give the landlord, at least three months before the end of the term, notice in writing of his intention to remove from the demised premises, in order to terminate the demise. The words and the requirements of the statute, both in regard to the landlord and the tenant in that respect are to be construed strictly, and the notice required of either must be actually given to the other within the time prescribed by the statute. *Roberts v. Grubb*, 461.

12. The defendant in a *levari facias* on a mortgage became the purchaser of the premises at the sale, but failed to comply at the return of the writ, and the day before the sale of them on the *alias lev. fa.* leased them to his mother for a year and was paid the whole rent in advance; the plaintiff in the writ then became the purchaser of them without any notice or knowledge of the lease. It was held to be a fraudulent artifice that would not prevent the issuing of a writ at the return term to put the purchaser in possession of the premises. *The Smyrna B. L. A. v. Worden*, 508.

See DECEIT; EJECTMENT, 6, 7; WRIT OF RESTITUTION, 1, 2.

LEAVE TO AMEND. See AMENDMENT.

LEGACIES. See WILL, 4, 5, 6, 7, 8, 9, 10.

LEVY OF EXECUTION PROCESS. See JUDICIAL SALES, 6, 7, 8; TAXES; TROVER, 1, 2.

LIEN. See MECHANIC'S LIEN; RECOGNIZANCE, 1, 2; RESULTING TRUST, 7; TAXES; CONDITIONAL SALE OF PERSONAL PROPERTY, 4.

LIMITATION OF ACTIONS. See PROMISSORY NOTE, 1, 2; LANDLORD AND TENANT, 11; RESULTING TRUST, 5, 6, 7; ISSUE ON JUDGMENT, 2.

LOAN. See JUNCTION AND BREAKWATER RAILROAD COMPANY; RECOGNIZANCE, 1, 2.

MALICIOUS SUIT. See LANDLORD AND TENANT, 4.

MARRIED WOMEN.

1. In an action under the statute against a married woman for goods sold and delivered to her while living separate from her husband and not supported by him, an allegation to that effect made by her in her petition filed in court against her husband for a divorce constitutes an admission on her part that may be given in evidence against her to prove that fact on the trial of the case.

2. The action being on a promissory note purporting to be made and signed by her, but denied by her, her signature to her affidavit of defense filed in the action, being admitted to be genuine, was offered and admitted in evidence in order that the jury might compare the two signatures and determine whether that to the note was or was not genuine also.

MARRIED WOMEN—*Continued.*

3. Any cohabitation between the husband and wife after the goods have been sold and delivered to her will defeat the action under the statute, and if her promissory note be afterward taken for the price of them it will defeat the action on that also. *McCafferty v. Heritage*, 220.

MATERIAL ALTERATION. See PROMISSORY NOTE, 7, 10; INSURANCE, 6.
MECHANIC'S LIEN.

1. The mechanic lien law imperatively requires that a party who furnishes materials for the repairs of a building on the credit of it, shall file a statement of his claim therefor in the office of the prothonotary of the county wherein it is situated within sixty days from the last delivery of the materials, but if after the delivery of them is finished, he receives from the contractor to do the repairs and supply the materials for the purpose to whom he furnished them, and within the sixty days, his promissory note for the amount due for them, payable to his order three months after date, it will not only suspend his right to sue the contractor, or the owner of the building until the maturity of the note, but it will constitute in effect a complete waiver of his legal right to file a statement of his claim and obtain a judgment and lien upon it against the owner under the statute. *Quinby & Co. v. City of Wilmington*, 26.

2. After argument on a general demurrer in the trial of a *scire facias* under the mechanic's lien law, the court refused the application of the plaintiff for a continuance of the case with leave to amend so as to substitute an action of *assumpsit* at common law in lieu of the *scire facias* under the statute in the case, and gave judgment for the defendant on the demurrer. *Wood & Co. v. Wil. Conf. Academy*, 513.

MORTGAGE.

Under the act of assembly to loan the J. & B. R. R. Co. the bonds of the State to the amount of four hundred thousand dollars on the mortgage of the company for that amount, and the amendment and the supplement thereto, the mortgage to be without interest for two years from its date, and forty-eight thousand dollars of the bonds to be retained and sold by the State treasurer to pay the interest for the two years, but which were not sold, he having paid the same out of the current revenue of the State, held by the court that the State was not entitled under the acts of assembly referred to, to interest on the mortgage for the first two years, as the bonds retained for that purpose had not been sold by the State treasurer. *J. & B. R. R. Co. v. Davis*, 90.

See CONDITIONAL SALE OF PERSONAL PROPERTY, 4; JUDICIAL SALES, 2, 9; TAXES; AFFIDAVIT, ETC., 2; WRIT OF POSSESSION, 1.

MUNICIPAL CORPORATION. See WILMINGTON, 2, 3, 4, 5.

NEGLIGENCE. See COLLISION; RAILROAD CORPORATION, 7, 8, 10.

NOTICE.

1. A party properly notified to produce a paper in his possession on the trial of a case is required to produce it if demanded for the inspection of

NOTICE—*Continued.*

the counsel of the opposite party before the trial has commenced. *Deringer's Admr. v. Deringer's Admr.*, 148.

2. A book or paper produced in court on notice from the other side, under the statute and the order of the court, proves itself without evidence if there be no subscribing witness to it, or if there be and both parties claim or take title or interest under it; but if the party producing it claims or takes no title or interest under it, and there is a subscribing witness to it, he must be called to prove the execution of it, as in other cases. *Taylor v. Jackson*, 224.

3. On the filing of a plea of set-off of one thousand dollars for so much money had and received by the plaintiff to and for the use of the defendant, drawn at full length according to the form prescribed for such a plea, the counsel for the plaintiff gave notice to the counsel for the defendant to state the matters of set-off referred to in it with greater certainty, which was not done, and he therefore declined to reply to the plea and at the term the court upon his application ordered it to be done. *Deringer's Admr. v. Deringer's Admr.*, 520.

See JUDICIAL SALES, 1; INSURANCE, 5; FRAUD, 1, 2, 3; WRIT OF RESTITUTION, 1.

ONUS PROBANDIO.

In an action of *scire facias* on a judgment when the only plea is payment, the defendant is entitled to the opening and conclusion. *Green's Admr. v. Ford and Anderson*, 575.

ORDINANCE. See WILMINGTON, 1; RAILROAD CORPORATION, 9.

ORPHANS' COURT. See RECOGNIZANCE, 1, 2.

PARTITION. See RECOGNIZANCE, 1, 2.

PARTNERSHIP. See RESULTING TRUST, 2, 3, 4, 5, 6, 7.

PARTY. See WITNESS, 1.

PAYMENT, PRESUMPTION OF FROM LAPSE OF TIME. See ISSUE ON JUDGMENT, 2.

PERMISSIVE POSSESSION. See EJECTMENT, 6.

PERSONAL ESTATE OF TESTATORS. See WILL, 4, 5, 6, 7, 8, 9, 10.

PLEADING.

1. A special plea in an action on a policy of insurance that the plaintiffs permitted the building insured to be used for purposes which increased the risk of loss by fire, without stating what such purposes were, is deficient in particularity and demurrable. *Hoffecker & Bro. v. N. C. C. M. I. Co.*, 101.

2. A judgment rendered by a justice of the peace on a cause of action of which he has no jurisdiction cannot be pleaded in bar to a suit on the same cause of action between the same parties afterward brought in the Superior Court. Nor is it necessary that it should be reversed before the suit is commenced in this court.

PLEADING—*Continued.*

3. Such a judgment is a nullity and the maxim *nemo debet bis vexari pro eadem causa* does not apply to another suit on the same cause of action in a court having competent jurisdiction of it.

4. No action will lie on a guardian bond before a justice of the peace. *Green v. Clawson*, 159.

See LANDLORD AND TENANT, 1, 2, 3, 4; FORMER RECOVERY; PROMISSORY NOTE, 3, 4, 10.

PLEA OF PAYMENT.

In an action of *scire facias* on a judgment when the only plea is payment, the defendant is entitled to the opening and conclusion. *Green's Admr. v. Ford and Anderson*, 575.

PLEA OF SET-OFF.

On the filing of a plea of set-off of one thousand dollars for so much money had and received by the plaintiff to and for the use of the defendant, drawn at full length according to the form prescribed for such a plea, the counsel for the plaintiff gave notice to the counsel for the defendant to state the matters of set-off referred to in it with greater certainty which was not done, and he therefore declined to reply to the plea and at the term the court upon its application ordered it to be done. *Deringer's Admr. v. Deringer's Admr.*, 520.

POLICY OF INSURANCE. See INSURANCE.

POSSESSION. See EJECTMENT, 4, 5, 6; WRIT OF POSSESSION, 1, 2.

PRACTICE.

1. A party properly notified to produce a paper in his possession on the trial of a case is required to produce it if demanded for the inspection of the counsel of the opposite party before the trial has commenced. *Deringer's Admr. v. Deringer's Admr.*, 148.

2. The words "payable at the Farmers' Bank" in the body of a negotiable promissory note is a material part of it, and if omitted in the declaration upon it will constitute a fatal variance.

3. In such a case where the bar of the statute of limitations would defeat another action upon the note, after the jury had been sworn, and it had been offered in evidence and ruled out, the court granted leave to amend the narr, directed a juror to be withdrawn and the case to be continued. *Thornton, Conrow & Co. v. Herring*, 154.

4. The lands of a defendant in a judgment cannot be seized and sold by the sheriff on a *fi. fa.* even under a waiver by the defendant of the seizure and sale of his personal property and inquisition, without a writ of *venditioni exponas*, at least, for that purpose. *Cloud v. Lore*, 163.

5. By the laws of this State no corporation aggregate, whether incorporated by the legislature of this State or of any other State, can be appointed an administrator in this State, or can sue as an administrator in the courts of this State. *Fidelity I., T. & S. D. Co. v. Niven*, 163.

6. As well in actions for the non-payment of the price of goods sold and delivered under a contract as in actions for goods sold and delivered with

PRACTICE—*Continued.*

warranty or in actions for work and labor done under a contract, the defendant may at his election either avail himself of any breach of the contract by the plaintiff causing damage to him in reduction of the damage claimed and sustained by the plaintiff from any breach of it by him, or he may sue the plaintiff for the same independently, and the former suit and recovery against him will be no bar to the latter unless in the former suit he had availed himself of his right and privilege to prove and claim such damage in reduction of the damage demanded in it by the plaintiff from him. *Tomlinson & Co. v. Quigley*, 168.

7. On affidavit and copy of the cause of action filed judgment given, notwithstanding the affidavit of defense filed alleged that the promissory note which was the cause of action was given by the defendant to the plaintiffs for goods sold and delivered, and by mistake the amount of it was in excess of the value of the goods, and he has paid them in full for the actual value of them. *Cooch & Co. v. Money*, 177.

8. In an action under the statute against a married woman for goods sold and delivered to her while living separate from her husband and not supported by him, an allegation to that effect made by her in her petition filed in court against her husband for a divorce constitutes an admission on her part that may be given in evidence against her to prove that fact on the trial of the case.

9. The action being on a promissory note purporting to be made and signed by her, but denied by her, her signature to her affidavit of defense filed in the action, being admitted to be genuine, was offered and admitted in evidence in order that the jury might compare the two signatures and determine whether that to the note was or was not genuine also. *McCafferty v. Heritage*, 220.

10. A book or paper produced in court on notice from the other side, under the statute and the order of the court, proves itself without evidence if there be no subscribing witness to it, or if there be and both parties claim or take title or interest under it; but if the party producing it claims or takes no title or interest under it, and there is a subscribing witness to it, he must be called to prove the execution of it, as in other cases. *Taylor v. Jackson*, 224.

11. A corporation created and authorized by statute in another State to administer on the estates of deceased persons in that State, having done so, may sue as such administrator in the courts of this State for a debt due the decedent in this State. *Deringer's Admr. v. Deringer's Admr.*, 416.

12. In an action of *scire facias* on a mortgage the transcript of the mortgage and the affidavit of the cause of action must be filed together at the same time by the plaintiff, or he will not be entitled to a judgment at the first term for want of an affidavit of defense. *Parker v. Moleston*, 433.

13. The court will not dismiss an appeal for want of form as prescribed by the statute, because the condition of the surety in it was "that the said appeal shall be prosecuted with effect, and that any judgment which shall be rendered against the said defendant or his executors or administrators

PRACTICE—Continued.

upon said judgment shall be satisfied," instead of "and that any judgment rendered against the said David Miller, his executors or administrators, upon said appeal shall be satisfied." *Miller v. Holding*, 494.

14. After argument on a general demurrer in the trial of a *scire facias* under the mechanics' lien law, the court refused the application of the plaintiff for a continuance of the case with leave to amend so as to substitute an action of *assumpsit* at common law in lieu of the *scire facias* under the statute in the case, and gave judgment for the defendant on the demurrer. *Wood & Co. v. Wil. Conf. Academy*, 513.

15. On the filing of a plea of set-off of one thousand dollars for so much money had and received by the plaintiff to and for the use of the defendant, drawn at full length according to the form prescribed for such a plea, the counsel for the plaintiff gave notice to the counsel for the defendant to state the matters of set-off referred to in it with greater certainty, which was not done, and he therefore declined to reply to the plea and at the term the court upon his application ordered it to be done. *Deringer's Admr. v. Deringer's Admr.*, 520.

16. If in an action on a promissory note a duly certified copy of it be filed with the declaration by the plaintiff, and the defendant does not file an affidavit at the time of pleading to it denying his signature to the original note of which it purports to be a sworn and correct and literal copy, he will not be thereby concluded from proving on the trial that it had been materially altered since he signed it without his knowledge and consent. *Hollis v. Vandergrift*, 521.

17. Only such instruments of writing for the payment of money as are for the payment of money simply and for nothing more are included in the statute which provides for the recovery of judgment at the first term, on copy of the cause of action filed by the plaintiff with his affidavit that he believes it to be justly and truly due, without an affidavit by the defendant that he has a legal defense to the same or a part thereof, etc. *Tweed v. Dayett*, 526.

18. The making of a probate against the estate of a deceased person by the treasurer of an incorporated company appointed administrator of the deceased creditor in another State under an act of incorporation chartering it for such purposes is not warranted by the provisions of our statute in regard to probates. *Deringer's Admr. v. Deringer's Admr.*, 528.

19. The court will not award a writ to put in possession the purchaser of premises at sheriff's sale under execution process where the legal title of the defendant in the writ thereto is in dispute and he was out of the possession of them at the time of the sale. *Wright v. Moore's Admr.*, 573.

20. The statute in relation to the writ has not dispensed with the necessity of a *ca. sa.* and a return of *non est inventus* thereon before the commencement of an action of debt on a recognizance of bail taken in an action of trespass *quare clausem fregit*. *Layton and wife v. Houston*, 574.

21. In an action of *scire facias* on a judgment, when the only plea is payment, the defendant is entitled to the opening and conclusion. *Green's Admr. v. Ford and Anderson*, 575.

PRACTICE—*Continued.*

22. There is no material difference in the meaning of the statutory provision and of the rules of the Superior Court, No. 6 and No. 7, on the subject of a defendant's duty to file with his plea an affidavit denying his signature to and the obligation of a promissory note, when a duly certified copy of it is filed by the plaintiff with his declaration in the action. And if such an affidavit of denial be not so filed in such a case by the defendant, he cannot prove a material alteration in any part of the note on the trial. Nor will he be allowed to file such an affidavit at the trial. *Hollis v. Vandergrift*, 597.

See RECOGNIZANCE, 1, 2; INSURANCE, 3, 4.

PRINCIPAL AND AGENT. See AGENT.

PRINCIPAL IMPROVEMENTS. See JUDICIAL SALES, 9, 10.

PROBATE.

The making of a probate against the estate of a deceased person by the treasurer of an incorporated company appointed administrator of the deceased creditor in another State under an act of incorporation chartering it for such purposes is not warranted by the provisions of our statute in regard to probates. *Deringer's Admr. v. Deringer's Admr.*, 528.

See WILL, 1.

PROCESS.

Service of on defendant essential to give jurisdiction to any court, State or foreign.

See JUDGMENT, 1, 2, 3.

PROMISSORY NOTE.

1. The words "payable at the Farmers' Bank" in the body of a negotiable promissory note is a material part of it, and if omitted in the declaration upon it will constitute a fatal variance.

2. In such a case where the bar of the statute of limitations would defeat another action upon the note, after the jury had been sworn, and it had been offered in evidence and ruled out, the court granted leave to amend the narr, directed a juror to be withdrawn and the case to be continued. *Thornton, Conrow & Co. v. Herring*, 154.

3. If in an action on a promissory note a duly certified copy of it be filed with the declaration by the plaintiff, and the defendant does not file an affidavit at the time of pleading to it denying his signature to the original note of which it purports to be a sworn and correct and literal copy, he will not be thereby concluded from proving on the trial that it had been materially altered since he signed it without his knowledge and consent.

4. An action of *assumpsit* will lie against one of several makers of a promissory note, although it is not made joint and several in its terms. And in such an action on such a promissory note a material alteration made in it at the instance of the maker sued on it before he signed it, or made afterward and approved by him, will not vitiate or avoid it as to him, nor in the latter case will the execution of a judgment bond by all

PROMISSORY NOTE—*Continued.*

the makers of the note after the maturity of it for the amount of it, and not accepted by the payee of it, constitute such an approval by the defendant, unless it is proved that he knew of the alteration when he executed the bond.

5. What was said to the payee and plaintiff in such an action about the note by another maker of it, and who was the first and principal one of them, when he delivered it to him, in the absence of the defendant, is not admissible in evidence.

6. An attorney-at-law residing in Maryland, who was of counsel for the plaintiff, who also resided in that State when the promissory note was given, but was not and never had been of counsel for him in the case before the court, admitted as a witness for him to prove a matter the knowledge of which he had acquired independently of any communication with or information from the plaintiff.

7. The doctrine of the law as to the presumptions of fact which arise in relation to alleged material alterations in written instruments when unexplained by direct and positive evidence, as recognized and ruled in this court in the case of *Welch v. Coulborn*, 3 *Houst.* 647, affirmed. *Hollis v. Vandergrift*, 521.

8. A statute of Missouri allowing ten per cent. interest, published among the revised statutes of that State in 1865, presumed to be still force in 1877 in the absence of any evidence to the contrary.

9. And a promissory note bearing ten per cent. interest dated at Westport, Missouri, will be presumed to have been made there in the absence of any evidence to the contrary. *Parks v. Evans*, 576.

10. There is no material difference in the meaning of the statutory provision of the rules of the Superior Court, No. 6 and No. 7, on the subject of a defendant's duty to file with his plea an affidavit denying his signature to and the obligation of a promissory note, when a duly certified copy of it is filed by the plaintiff with his declaration in the action. And if such an affidavit of denial be not so filed in such a case by the defendant, he cannot prove a material alteration in any part of the note on the trial. Nor will he be allowed to file such an affidavit at the trial. *Hollis v. Vandergrift*, 597.

See MECHANIC'S LIEN, 1; AFFIDAVIT, ETC., 1; MARRIED WOMEN, 2, 3; USURY.

RAILROAD CORPORATION.

1. Fraud practiced in the inception of a contract renders it void; it is, however, never to be presumed, but must be clearly proved. Actual or positive fraud is any false representation, deceit, device, or artifice resorted to or used with intent and for the purpose of deceiving or misleading another to his injury, and may be proved either directly or inferentially, as any other fact.

2. The fraud meant or signified by the plea of fraud and covin is not merely legal, but it is moral fraud as well, practiced on the other party with intent to deceive or mislead him in respect to the very transaction

RAILROAD CORPORATION—*Continued.*

and subject of controversy between the parties. It consists in a false representation or concealment of material facts with intent to deceive, although knowledge or information of the matter be not exclusively within the reach of the party misrepresenting or concealing it.

3. A representation, however, though false, will not vitiate a contract unless it be fraudulent also and operates as an inducement influencing the other party to enter into the contract. And it may be laid down as a rule of universal application and acceptance that a collateral statement made at the time of entering into a written contract, but not embodied in it, to invalidate it on the ground of its being a fraudulent statement, must be shown to have been not only false, but that it was known to be false by the party when he made it, and that the other party was thereby induced to enter into the contract.

4. An assurance given by the agent of the commissioners of a railroad company to procure subscriptions to the stock, to a subscriber at the time of his subscribing to it that if he would do so, the railroad of the company would be located and constructed by a route specifically designated by him, and on the faith of which he subscribed for one hundred shares of the stock, but which assurance was not embodied in the contract of subscription, was a collateral statement, and if the agent at the time he made it knew it to be untrue, and made it with the fraudulent intent to mislead and deceive the subscriber, it would amount to a fraud which will vitiate and avoid his contract of subscription.

5. If by the terms of the charter of the company and the contract of subscription, and the contract of subscription is in writing under the hand of the subscriber, the stock is to be paid for in such manner and proportion and at such times as shall be determined by the president and directors of the company and in such installments as they shall require, provided that no payment shall be demanded until at least thirty days' public notice shall have been given in at least one newspaper published in the county in which such payment shall be demanded, and the payment of it is so called for, and published in five successive installments, the six year's bar of the statute of limitations will not begin to run against the claim of the company from the date of the contract of subscription, as in the case of a promissory note payable on demand, but from the time when the cause of action accrued, which was not until it became payable according to the calls for the installments and the thirty days' publication of them; and if they had been even so barred, the payment of the first within the six years would have taken the claim for the balance out of the operation of the statute. *Kent County R. R. Co. v. Wilson*, 49.

6. If a railroad company incorporated and organized under an act of the legislature of Maryland to build a road in that State, afterward obtains a special act of incorporation of it by the legislature of this State for the purpose of extending the road into this State, but subsequently abandons the design and does nothing under the act, it will not become a corporation of this State or be exempt from our writ of

RAILROAD CORPORATION—*Continued.*

attachment against foreign corporations. *P., W. & B. R. R. Co. v. Kent Co. R. R. Co.*, 127.

7. In an action on the case for a personal injury the result of negligence, if it be alleged in the narr that the plaintiff was thrown from his carriage violently upon the ground, and was wounded and bruised, etc., he cannot prove a personal injury inflicted in a different manner.

8. Exemplary or punitive damages, as they are termed, cannot be recovered in an action on the case for consequential damages.

9. The municipal corporation of the city of Wilmington has the power to forbid by ordinance any railroad company to leave any engine, train, or car stationary on any track owned or used by it where it is crossed by any street of the city for a longer time than ten minutes except in case of an accident, and it is in violation of the common law as well as of the ordinance to do so.

10. But any negligence on the part of the plaintiff which contributed to produce the accident and consequent injury is a complete legal defense to such an action. The care required of him, however, to prevent or avoid the accident is only ordinary care, and not extraordinary care, but it must be in proportion to the danger to be avoided; the greater the danger in the way the greater is the care required to avoid it, or, in other words, it is such care as a reasonably prudent man under the peculiar circumstances of the case would exercise to preserve himself and property from injury, and this imports such a man entirely sober at the time and in full possession of his faculties of observation, attention, and reflection.

11. The people of the city of Wilmington and the public generally have a paramount right to the use of the public streets and highways of it, but as the defendant, the railroad company, not only has the right conferred but is expressly bound by its charter to provide and maintain a good and sufficient crossing at the intersection mentioned for the use of the public, it was not bound while engaged in relaying and repairing it to suspend any of its business on their railroad or the transit of any of its trains over it in order to complete it in the shortest time and with the least inconvenience to the public possible, provided it was prosecuted with reasonable diligence and dispatch under all the circumstances. *McCoy v. P., W. & B. R. R. Co.*, 399.

See *P. & B. R. R. Co.*

RECOGNIZANCE.

1. If on the sale upon a *scire facias* on a recognizance taken in the Orphans' Court in proceedings for the partition of the real estate of an intestate, in which the widow waives the assignment of her dower therein and elects to take in lieu of it the interest during her life on the on third of the amount for which it was sold at trustee's sale in pursuance of the proceedings in that court, and owing to the great depreciation of it in the meantime it sells for less than the real sum for which the recognizance was so taken, the Superior Court will, on the return of the writ and the paying of the money into that court by the sheriff, order the entire

RECOGNIZANCE—Continued.

amount of it, minus the costs, to be loaned on approved security with the interest thereon to be paid to the widow during her life and the principal thereof at her death to the administrator of the intestate, or as the court may otherwise direct. *Russell v. Bennett et al.*, 497.

2. A purchaser of intestate lands under proceeding for the partition of them in the Orphans' Court entered into recognizance to pay the interest on the one-third of their value to the widow during her life, and the principal at her death to the parties entitled, and the other two-thirds to the parties entitled with interest at the expiration of one year from the date of the recognizance, against whom judgments were afterward obtained in the Superior Court, on which all his lands in the county were sold at sheriff's sale by the then sheriff; and as the two-thirds of the recognizance had been satisfied before that on the record, the sheriff improperly applied all the proceeds of the sale to the judgments. Afterward the lands of the surety in the recognizance were sold on a judgment in the same court against him by a later sheriff, who brought so much of the money arising from the sale of them as was applicable to the widows' one-third of the recognizance into the Superior Court under the statute for reinvestment for the benefit of the parties concerned, which was done by a loan of it to a party who has recently died, and whose administrator repaid the same into court at this term; and on application for that purpose the court applied it to the oldest outstanding judgment against the surety in the recognizance on the ground that it had been misapplied by the late sheriff, as the recognizance had been satisfied by the return of the preceding sheriff of the sale of the lands of the principal in it, and by which the lands of the surety had been discharged from the lien of it. *Ex parte Day, trustee of M. J. Allee*, 510.

See BAIL.

RECORD. See REPLEVIN, 3, 7; TROVER, 1.

REGISTER OF WILLS. See WILL, 1.

RENT. See LANDLORD AND TENANT.

REPLEVIN.

1. Neither the raw material furnished by another to the tenant of a woolen factory to be woven into flannel for him at a stipulated price per yard nor the fabric when made, on the demised premises, are subject to distress for rent due the landlord and in arrears for the past year, or to the landlord's attachment for the rent growing due the current year; but they both have a preference as to other goods on the premises belonging to the tenant over attachments against him for wages due the hands employed in the factory.

2. In an action of replevin each party may be an actor. If the goods have been replevied and the plaintiff prevails in it he is entitled to nominal damages and also his costs; but if the defendant prevails in it he is entitled to a return of the goods or to damages to the value of them and also his costs. If a verdict be found that a part of the goods reple-

 REPLEVIN—*Continued.*

vied were the property of the plaintiff and a part were not, each party must be considered as prevailing to that extent respectively, and the verdict must so be in favor of each of them respectively; and as each party has judgment upon it for his damages, either nominal or substantial, he is so far a prevailing party and must also have his costs. *Knowles v. Pierce*, 178.

3. In an action of replevin for a mule and a cow, in which the mule but not the cow was replevied and delivered to the plaintiff, who suffered a judgment of *non pros.* by failing to file a declaration in it, on which the defendant took an assignment of the replevin bond, and sued him and recovered judgment upon it, the record of neither action is evidence to support a plea of former recovery in a subsequent action of replevin by the plaintiff against the defendant for the cow only. *Poor v. Darah*, 394.

4. In an action of replevin by the purchaser of goods at a constable's sale, the record of the judgment on which the execution was issued is admissible in evidence without the production and proof of the warrant on which it was entered by the justice of the peace.

5. The plaintiff in such a case must show the judgment and execution on which the goods were sold and he bought them, but he is not bound to show the regularity or sufficiency of the levy of the execution on them by the constable, for that cannot be collaterally inquired into or considered in the action.

6. Where the goods were not replevied under the writ, the value of them when they were taken by the defendants is the measure of the damages the plaintiff is entitled to recover in the action, and it is in the discretion of the jury to allow him interest thereon if they see proper.

7. Although the defendant in the judgment stands in the relation of step-father to the plaintiff, if the obligation on which it was entered was not for a just and *bona fide* debt due to the latter, but was a cover merely to shield his property against the claims of actual creditors and the plaintiff allows the goods to remain in his use and possession after the sale of them on the execution, it will vitiate and avoid the sale thereon as fraudulent in law, and the plaintiff will take no title to them, but in the absence of direct and positive proof that such was the case, the fact that he bought the goods at the constable's sale for much less than their value and allowed them to remain in the possession of the defendant would not present sufficient circumstantial or presumptive evidence to sustain the defense of fraud set up in the case, for the provision of the statute of frauds which renders void the sale of goods whether by bill of sale or otherwise, without an actual delivery of them to the vendee, does not apply to a public judicial sale of goods under execution process. *Joyce v. Cannon et al.*, 409.

See LANDLORD AND TENANT, 12.

RESCINDING CONTRACT. See FRAUD, 1, 2, 3.

RESTITUTION. See WRIT OF RESTITUTION.

RESULTING TRUST.

1. The statute of 1859, enabling parties in civil suits to call the adverse party as a witness, does not render competent a party who, although adverse upon the record, is otherwise incompetent as a witness for the party calling him by reason of interest.

2. Real estate, suitable for the business of a firm, was bid off in the year 1849, at sheriff's sale, by A. H., a partner of the firm of H., H. & Co., and title taken in his own name, part of the purchase-money being paid in cash out of the funds of the firm, and the balance secured by liens upon the property, of which liens most of the interest and so much of the principal as was paid prior to the death of A. H. were systematically drawn from the funds of the firm. The larger portion of the property was used by the firm for its business, and no rent paid or charge, rents from other portions being received by the firm. A. H., the purchasing partner, having charge of the firm's books. The evidence disclosed facts which warranted the presumption of an understanding or agreement among the partners that the property was purchased in trust for the firm, and that it was so held up to the death of the purchasing partner in 1865. The firm dissolved in 1854 by the retirement of J. R., the complainant's intestate, but no settlement was made with him, and the business was continued by A. H. and A. H. H., the remaining copartners, under the same firm name. Upon bill filed in 1873 by the administrator of J. R., *held* that the real estate, which since the death of A. H. had been held by his widow as devisee, was subject to a resulting trust as partnership property, in favor of the first firm of H., H. & Co., and that the complainant was entitled, as administrator of his father, J. R., to one-third of the proceeds thereof.

3. In the absence of fraud or breach of trust, property purchased with partnership funds does not of necessity become partnership property if that is not the intention of the parties.

4. The circumstance that the payment has been made out of the partnership funds, especially if the property purchased be necessary for the ordinary operations of the partnership business and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property, and in the absence of all countervailing circumstances it will be absolutely decisive.

5. Claims of complainant for partnership balance due his intestate in 1854, for advances to the partnership by way of loans and otherwise, *held* to have been barred by the lapse of time. These claims having been barred before the death of the intestate, no diligence on the part of his administrator could relieve them from the bar of the statute.

6. The acknowledgment by a former partner that these claims were subsisting and unpaid, *held* insufficient to revive them as against the representatives of his deceased copartner.

7. A partner's lien, even upon the real estate of his firm for advances made to it, is a personal lien purely, in equity, and expires with the extinction of the claim by the bar of the statute. *Rice v. Pennypacker et al.*, 279.

REVIEW. See WILL, 1.

RULES OF COURT. See PROMISSORY NOTE, 10.

SALE. See CONDITIONAL SALE. JUDICIAL SALES.

SEAL. See CORPORATION, 1, 5; LANDLORD AND TENANT, 11.

SEIZIN. See DOWER, 2.

SEPARATION OF HUSBAND AND WIFE. See MARRIED WOMEN, 1, 2, 3.

SET OFF. See PLEA OF SET OFF; CONTACT, 5.

SHERIFF. See TROVER, 1, 2.

SHERIFF SALES. See JUDICIAL SALES; AGENT; RECOGNIZANCE, 1, 2; WRIT OF POSSESSION, 1, 2.

SPECIFIC LEGACY. See WILL, 9.

STAMPS. See INSURANCE, 2.

STEAM TUG TOWING. See COLLISION.

STOCK SUBSCRIPTION. See CONTRACTS, 7; RAILROAD CORPORATION, 4, 5.

SURETY. See APPEAL FROM JUSTICE OF THE PEACE; RECOGNIZANCE, 1, 2.

TENANT. See LANDLORD AND TENANT.

TENANT BY THE CURTESY. See EJECTMENT, 1, 2, 3.

TENDER.

In cases of contracts for the payment of money or the delivery of goods where no place is named in the agreement for the payment or delivery, or no established usage prevails to the contrary, as in cases of promissory notes and bills of exchange, the party has the whole day at any place where he may meet the other party and have the proper means and opportunity so far as they are both concerned of making the tender, in which to make it, and he is bound to find the other party at his peril within the time limited if he is in the State, and he must do all that he can do, without the concurrence of the other party, to make the payment or delivery, and that at a convenient time before midnight, such time varying according to the quantum of the payment to be made or the nature of the goods to be delivered and received. *Smith v. Walton & James*, 141.

TESTATOR'S CAPACITY TO MAKE A WILL. See WILL, 2, 3.

TESTATOR'S PERSONAL ESTATE. PRIMARY FUND FOR PAYMENT OF HIS DEBTS AND LEGACIES. See WILL, 4, 5, 6, 7, 8, 9, 10.

TRESPASS.

1. A purchaser of personal property at a sale made by a public officer of whatever kind under process of law, has the right to enter upon the premises of the defendant in the execution in a peaceable and orderly manner without obtaining any permission from him, and to take and carry them away.

2. If the issue to be tried before the jury be whether the proceedings and acts of the constable in levying upon and selling such property wer

TRESPASS—*Continued.*

fraudulent and contrary to the provisions of the act of assembly in such case made and provided, and they should be so found by the jury, and that they were committed with the knowledge and consent of the plaintiff in the process, who purchased them, then he will be liable to the defendant in it in an action of trespass *quare clausem fregit* for entering his premises and taking and carrying away the personal property purchased by him under such process in damages to the value of it.

3. To constitute fraud on the part of a public officer in the execution of legal process it must be shown that he designedly and willfully acted with respect to the defendant in such a covenous, deceitful, treacherous, and dishonest manner as to deprive him of some right or benefit to which he was entitled or subject him to some damage or injury; and if done with the knowledge and consent of the plaintiff in the process, it would be fraudulent in both of them, and in either case the sale would be treated in the tribunal out of which the process issued as utterly void and the plaintiff would not allowed to derive any benefit from it. So also, if a mere purchaser at such a sale should conspire with the officer to commit the fraud, he could not be allowed to retain any property bought by him at such fraudulent sale.

4. But although the doings of an officer with or under his process may be irregular, yet, if they are honest, they are so far valid as not to affect the rights of parties taking title under him. Because in that case the validity of the sale cannot be collaterally controverted or inquired into in a proceeding before another tribunal; and in case of a sale by a constable voidable for a mistake or irregularity committed by either the justice or the constable, it is to be objected to before the justice who issued the process on the return of it. *Russell v. Stoeckel*, 464.

5. The statute in relation to the writ has not dispensed with the necessity of a *ca. sa.* and a return of *non est inventus* thereon before the commencement of an action of debt on a recognizance of bail taken in an action of trespass *quare clausem fregit*. *Layton and wife v. Houston*, 574.

TROVER.

1. In an action of trover by a sheriff against a tort-feasor for the taking and conversion of goods levied on by him under an execution in his hands, and on which he afterward by mistake returned the goods as sold by him, his return may be contradicted by him, and he is not estopped or concluded by it from proving the taking and conversion of the goods. For his return to the writ in such a case as a matter of record in the court does not import absolute verity, but is only *prima facie* true and may be contradicted.

2. The usual inventory and appraisement made by a sheriff in levying a *fi. fa.* execution on goods and chattels constituted such a constructive seizure and possession of them by him as sheriff from that time, and before any appraisement has been made of them by two sworn appraisers afterward, as to give him such a special property in them as will enable him to maintain an action of trover against a tort-feasor for the tortious

TROVER—*Continued.*

taking and conversion of them between that time and the appraisement of them made afterward by the two sworn appraisers. Or, in other words, that the inventory and appraisement of them made by the sheriff in the first instance constitutes a sufficient levy on them when there has been no actual seizure of them by him to give him such a special property in them before the appraisement of them by the two sworn appraisers afterward. *Hargadine, Sheriff, v. Ford*, 380.

TRUST. See **RESULTING TRUST**, 1, 2, 3, 4, 5, 6, 7.

USURY.

A negotiable promissory note obtained by the payees from the maker of it without consideration, upon the suggestion of the party who afterward discounts it for the payees at a higher rate of discount than six per cent., will constitute an accommodation note discounted by him with knowledge that it was such, and will be void for usury. *Nailor v. Daniel*, 455.

See **EVIDENCE**, 4, 5; **PROMISSORY NOTE**, 8, 9.

VARIANCE. See **PROMISSORY NOTE**, 1, 2.

VERBAL ACCEPTANCE OF WRITTEN ORDER FOR PAYMENT OF MONEY. See **ACCEPTANCE**.

VERITY OF SHERIFF'S RETURN ON EXECUTION PROCESS.
See **TROVER**, 1.

WAIVER. See **MECHANICS' LIEN**, 1; **JUDICIAL SALES**, 6.

WARRANT OF ATTORNEY. See **ISSUE ON JUDGMENT**, 2.

WIDOW. See **DOWER**. **RECOGNIZANCE**, 1, 2.

WILL.

1. On appeal from the decision of the register upon a petition of review affirming the probate of the will and grant of letters testamentary thereon, because he refused on the application of the petitioners for the review, after hearing the testimony of the witnesses on both sides, to order an issue of *devisavit vel non* in the case to be tried before a jury in the Superior Court, the court will take cognizance of it, though neither the appeal entered nor the record sent up by him showed that such an order had been applied for by the petitioners for the review or had been refused by the register. And the court will order an issue of *devisavit vel non* to be tried before a jury at the bar of the court on the trial of the appeal. And in such trial the written testimony of a witness then out of the State and in parts unknown, taken before the register on the hearing of the petition for review, is admissible in evidence and may be read to the jury.

2. Intellectual feebleness or mere weakness of the understanding, or a partial failure of mind and memory, or even to a considerable extent, whether it be natural or the result of injury, or arises from disease, such as apoplexy or paralysis or from any other cause, is not of itself a sufficient ground for setting aside a will if there still remain sufficient mind and memory to enable the testator to comprehend what he is doing,

WILL—*Continued.*

to understand that he is disposing of his estate by will, and to recollect what property he is thus disposing of, and to whom he is disposing of it at the time when he executes the will; if so, he is capable of making a will.

3. And on the question of his mental capacity to make a will at the time he executed it, the testimony of the subscribing witnesses to it, if persons of intelligence and veracity, is entitled to great weight. *Hall v. Dougherty*, 435.

4. The personal estate of a testator is the primary fund for the payment of his debts and legacies.

5. In the payment of legacies those of a specific nature are to be paid before general ones.

6. The real estate is not liable for the payment of either debts or legacies, unless the testator has unequivocally so declared in his will.

7. In this State all the property of a testator is subject to the payment of his debts, but the real is only to be resorted to for that purpose, even in the case of liens upon it, after the personal estate has been exhausted, which still preserves the rule that the personal estate is the primary fund for the payment of the testator's debts. Of course this is not to be understood as applying to liens which the creditor proceeds to enforce.

8. The bequest by a testator of all his personal estate has always been held, where there were no expressions in the will that required a different construction, to mean simply the balance of the personal estate that should be left after the payment of his debts and other legal charges, such as those of burial and of administration. And we know of no case in which those words alone have been held to cast the payment of the debts, expenses of administration and legacies upon the realty.

9. A legacy is only specific when it designates a particular thing or things by specific description, as my bay mare, my gold watch, or my shares of stock in bank, or the like, or mentions some place where the thing can be found, as my bank notes in a certain drawer, or indicates some part of the personal estate, consisting of various articles which can easily be distinguished and set apart from the residue, as all of my personal property in a certain room, house, hundred, county, etc. But where it is of all merely, indicating no locality or more particular specification, it is general, the same as is imported by the words rest and residue.

10. But when the intention of the testator to create a new fund for the payment of his debts appears plain, that fund must first be resorted to if he has so expressed himself. But before that is taken as a fact, there must be no doubt left on the face of the will; it must plainly appear by it that the testator so meant. And this is not to be settled by conjecture or mere inference, but is to be shown by unequivocal language or expressions contained in the paper itself. *Cooch's Exr. v. Cooch's Admr. et al.*, 540.

WILMINGTON.

1. An ordinance of the city of Wilmington prohibiting any person occupying or using any land or building for the purpose of producing or

WILMINGTON—*Continued.*

preparing beef, mutton, lamb, veal, or pork for sale or market, from selling or exposing the same for sale on the streets or sidewalks of the city, but providing that it shall not apply to any farmer, unless such farmer shall exercise the business of farming for the purpose of producing or preparing beef, mutton, lamb, veal, or pork for sale or market, does not apply to a farmer selling or exposing to sale on the streets of the city mutton produced and prepared on his farm for sale and market, unless it appears that he was at the time exercising the business of farming for that purpose. *Homewood v. City of Wilmington*, 123.

2. The city of Wilmington, as a municipal corporation, is not liable for consequential damages in flooding cellars by raising the grade of a street.

3. A municipal corporation is not liable for damages resulting from an act done or authorized by it in the due exercise of a discretion conferred upon it by law.

4. The functions of such a corporation are of two kinds, judicial and ministerial. Under the former are classed all those powers which are discretionary merely, such as those exercised in this case, of building the sewer in Monroe Street and raising the grade of Maryland Avenue. To the extent of deciding upon the location, the size, the inlets and outlets of the sewer, and the height and grade of the bed of the avenue, the powers were purely judicial or mental determinations, subject, as all such are, to the natural infirmity of human judgment. For the existence of such infirmity no court anywhere has ever held a party liable, nor for the mere mistakes or errors that resulted from it. They have never treated them otherwise than as misfortunes merely, involving no civil responsibility; and it is because of this consideration that such acts of a municipal body as are purely judicial or discretionary subject the corporation to no responsibility whatever, though they may result in great mischief or injury to individuals.

5. In the powers ministerial are embraced such acts of the municipal body through its officers or agents as are the expression or exercise of discretion in the matter of action, or things done in pursuance or in furtherance of the ends to be accomplished and determined upon by the discretion or judgment of the body politic. When in the use of powers ministerial or executory merely its course is a well-defined one, and it must follow it with due care, or submit to the legal consequences, for municipal corporations, though public bodies, are as subject to this rule of conduct as individuals are. Accordingly, the plan of grading Maryland Avenue and of constructing the sewer under Monroe Street, as matters to be decided by the municipal corporation, involved no sort of responsibility to private parties, but the carrying into effect the work contemplated by engineering agency, or by mechanical or manual labor, was not in any sense an exercise of a judicial, but of a ministerial power. When such a corporation acts in execution of a plan or design which it has determined on it loses its shield of judicial protection, and becomes as liable for faults

WILMINGTON—*Continued*

or errors in its action, as individuals who are held to competent skill in the performance of any work they may lawfully undertake that may affect the rights of others.

6. The law in such actions as this takes no account, nor allows a jury to do so, of any conjectural or speculative damages merely, or of any damage which is not the natural and proximate result of the act done, and which is not reduced by proof to an actual money estimate. *Magarity v. City of Wilmington*, 530.

See RAILROAD CORPORATION, 9.

WITNESS.

1. The statute of 1859, enabling parties in civil suits to call the adverse party as a witness, does not render competent a party who, although adverse upon the record, is otherwise incompetent as a witness for the party calling him by reason of interest. *Rice v. Pennypacker et al.*, 279.

2. An attorney-at-law residing in Maryland, who was of counsel for the plaintiff, who also resided in that State when the promissory note was given, but was not and never had been of counsel for him in the case before the court, admitted as a witness for him to prove a matter the knowledge of which he had acquired independently of any communication with or information from the plaintiff. *Hollis v. Vanderfrift*, 521.

3. The secretary, and as such the keeper of the books, of an incorporated company, who is counsel for it in the trial of a case against it in court, is not a competent witness in it. *Bancroft & Co. v. Wil. Conf. Academy*, 577.

WRIT OF *CAPIAS AD SATISFACIENDUM*.

The statute in relation to the writ has not dispensed with the necessity of a *ca. sa.* and a return of *non est inventus* thereon before the commencement of an action of debt on a recognizance of bail taken in an action of trespass *quare clausem fregit*. *Layton and wife v. Housion*, 574

WRIT OF POSSESSION.

1. The defendant in a *levari facias* on a mortgage became the purchaser of the premises at the sale, but failed to comply at the return of the writ, and the day before the sale of them on the *alias lev. fa.* leased them to his mother for a year and was paid the whole rent in advance; the plaintiff in the writ then became the purchaser of them without any notice or knowledge of the lease. It was held to be a fraudulent artifice that would not prevent the issuing of a writ at the return term to put the purchaser in possession of the premises. *Smyrna B. L. A. v. Worden*, 508.

2. The court will not award a writ to put in possession the purchaser of premises at sheriff's sale under execution process when the legal title of the defendant in the writ thereto is in dispute and he was out of the possession of them at the time of the sale. *Wright v. Moore's Admr.*, 573.

WRIT OF RESTITUTION.

1. The object of a writ of restitution under the provision of the statute in relation to the jurisdiction of justices of the peace in cases of for.

WRIT OF RESTITUTION—*Continued.*

cible entry and detainer, and of holding over lands and tenements, *Revised Code, chap. 101, p. 626*, where a judgment has been recovered under it against the party committing the forcible entry and detainer, or against a tenant holding over after notice to quit, and the same has been executed and has afterward been reversed on *certiorari* in the Superior Court, is to order the proceeds of the sale on the execution to be paid to the defendant in it in the first case and to restore to the removed tenant and defendant the possession of his term in the second case.

2. The Superior Court has special authority under the statute upon a writ of *certiorari* in cases of tenants holding over after notice to quit, to amend the record of the justice of the peace where the defects are purely formal and apparent on the face of the proceedings before him. *Shaw v. Fleming*, 155.

